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## Reasoning about the Irrational: The Roberts Court and the Future of Constitutional Law

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## REASONING ABOUT THE IRRATIONAL: THE ROBERTS COURT AND THE FUTURE OF CONSTITUTIONAL LAW

H. Jefferson Powell\*

*Abstract:* Commentary on the future direction of the Roberts Court generally falls along lines that correlate with the commentators' political views on the desirability of the Court's recent decisions. A more informative approach is to look for opinions suggesting changes in the presuppositions with which the Justices approach constitutional decision making. In footnote 27 in his opinion for the Court in the *District of Columbia v. Heller* Second Amendment decision, Justice Scalia suggested a fundamental revision of the Court's assumptions about the role of judicial doctrine, and the concept of rationality, in constitutional law. Justice Scalia would eliminate the normative aspects of the Court's inquiry into rationality, and reject altogether the generally accepted view that rationality review is a deliberate underenforcement of a constitutional norm of substantive reasonability, primarily implemented by the legislature. Footnote 27 cites Chief Justice Roberts's opinion in *Engquist v. Oregon Department of Agriculture*, which adopts a similar view of rationality as free of normative content. The common threads linking footnote 27, the *Engquist* opinion, and a debate between Justices Alito and Breyer in *McDonald v. City of Chicago* this past June, suggest that footnote 27 is a significant clue to the fundamental understanding of constitutional law that commands at least a plurality on the current Court. If this understanding becomes dominant, it will profoundly change the Court's treatment of precedent, rational-basis scrutiny, and the role of the political branches in constitutional law.

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## INTRODUCTION

Disagreement over the proper direction of constitutional law is as old as the Republic. At present, however, it isn't clear to many which direction—right or wrong—the United States Supreme Court is taking constitutional law. On the one hand, the editorial board of the New York Times spoke for a host of other critics in complaining that “the Roberts [C]ourt demonstrated its determination to act aggressively to undo aspects of law it found wanting, no matter the cost.”<sup>1</sup> By “the Roberts [C]ourt,” the editors meant what they described as a five-Justice “conservative majority [that] made clear that it is not done asserting itself” on issues of grave national importance,<sup>2</sup> perhaps including the constitutionality of health-care reform. From the perspective of these commentators, the Roberts Court has “come of age” and “entered an assertive and sometimes unpredictable phase,” in which (despite the occasional surprise) the majority Justices are “fearless” in exerting their

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1. Editorial, *The Court's Aggressive Term*, N.Y. TIMES, July 5, 2010, at A16. The Times' editors, to be sure, grudgingly conceded that it had not been “a thoroughly disappointing term,” but few readers will have doubted the editors' fundamental agreement with other, less nuanced critiques of the Court.

2. *Id.*

power to advance the politically conservative (pro-business, pro-gun, anti-criminal defendant) interests Chief Justice Roberts favors.<sup>3</sup> Elena Kagan's succession to the seat of retiring Justice John Paul Stevens, on this view, was at best a holding action against the Court's complete takeover by the Right.

On the other hand, the admirers of the Court's decisions generally insist that the critics are vastly overstating both the ideological content of the Court's judgments and the aggressiveness of the Justices who usually make up the majority in highly ideological, divided decisions. This error of analysis was quite deliberate, and the tale of political takeover was "all such tedious sophistry" by the Left, a dishonest demonization of Justices whose decisions were marked by caution and attention to the specific demands of the judicial process.<sup>4</sup>

The identity of the current Court, on this view, is shaped more by circumstance than ideology, and by the Justices' lawyerly approach to its role. As Jonathan Adler argued, "The Roberts Court is a work in progress, and the change in Court personnel will introduce new dynamics, as will a different combination of cases and issues that come before the Court. . . . [A]t present, we can characterize the Roberts Court as a moderately conservative minimalist Court . . . ."<sup>5</sup>

No reader was surprised to notice that critics of an aggressively ideological Roberts Court are to the left of center in terms of American politics, or that admirers of a judicially modest majority are equally likely to occupy positions to the political center's right. Those are precisely the positions of criticism or apologetics that one would expect, given contemporary politics and the contemporary Court. In itself, this correlation between the politics of commentators and their perceptions of the Court proves nothing: either the liberal critique or the conservative apologetics might actually be warranted by the Court's actions, even if there are political or sociological explanations for the

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3. Adam Liptak, *The Roberts Court Comes of Age*, N.Y. TIMES, June 29, 2010, <http://www.nytimes.com/2010/06/30/us/30scotus.html> (quoting Lisa S. Blatt on the Justices' fearlessness).

4. See Ann Althouse, "[T]he Roberts Court Demonstrated its Determination to Act Aggressively to Undo Aspects of Law it Found Wanting, No Matter the Cost.", ALTHOUSE (July 5, 2010, 10:13 AM), <http://althouse.blogspot.com/2010/07/roberts-court-demonstrated-its.html>.

5. Jonathan H. Adler, *Making Sense of the Supreme Court*, THE VOLOKH CONSPIRACY (July 2, 2010, 9:58 AM), <http://volokh.com/2010/07/02/making-sense-of-the-supreme-court/>. Like the Times' editors, Adler noted that it would be wrong to treat the Court's decisions as monolithic, in his case by qualifying his "moderately conservative minimalist" characterization of the majority: "(except when [it's] not)."

views the observers espouse.<sup>6</sup> The consistency with which the individual observer's analysis tracks his or her political views, however, does suggest that we are unlikely to make jurisprudential sense of "the Roberts Court," or more precisely of the law announced by the Court's current working majority in divisive cases, if we let our analyses move too quickly to the bottom line issues of political, economic, and moral significance to the Court's decisions. The outcomes simply matter too much—to most of us and to the Justices—and the demonstrable ideological content of the cases is reflected, isomorphically, in the demonstrable ideological slant of the commentators' analyses. As a result, much of what has been said about the Roberts Court has told us a great deal about the commentators' political, economic, and moral commitments—and very little about the Court's decisions as judgments of law.<sup>7</sup>

One response to the emptiness and predictability of so much purported analysis, enthusiastically endorsed by many political scientists, is to conclude that there is little or no value to the enterprise of making jurisprudential sense of the U.S. Supreme Court's constitutional decisions, in this or any other era. The Court is a political actor, the Justices' constitutional decisions are exercises of political choice (which of course need not mean political choice in a crude, partisan sense), and whatever socially valuable contributions scholars can make by studying the Court must lie in the various modes of empirical investigation into the demonstrable sources and ascertainable consequences of the Court's decisions. But empirical research, valuable as it is in ascertaining the Court's patterns of decision and its impact on the world, cannot displace entirely normative analysis, at least without a price heavier than perhaps most of us are willing to pay. The search to make sense of what the Court actually does, in the light of what the Court ought to do, is essential to the idea that the Court is actually "doing law" when it announces constitutional decisions. If we can say nothing about the Court's success, or failure, in carrying out the task of constitutional

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6. Perhaps the clearest statement of this fundamental truth—that we can recognize the relativity of all perspectives without that recognition implying in the least that no view is in fact correct—is to be found in Peter Berger's classic discussion of religious belief. *See* PETER L. BERGER, *A RUMOR OF ANGELS* 31–53 (1969). We cannot stop to discuss the philosophical issues; the purpose of citing Berger is solely to reject out of hand any argument that evaluation of the Court can only be an expression of the evaluator's prejudices.

7. There is little value in trying to determine whether any individual decision (or decisions) or Justice (or coalition of Justices) is activist or restrained; there again the conclusions are too predictable to be enlightening. The problems with "judicial activism" as a meaningful tool of analysis are well-known, and no purpose would be served by rehearsing them here.

decision responsibly, as a matter of law, other than to express our pleasure or dismay at the apparent politics of the Justices, then we have emptied that task, and constitutional law itself, of any distinctive quality.

Despite the political predictability of most of their work, however, the Term-end commentators on the Roberts Court—both the critics and the apologists—were right to look for legal patterns in the work of the Court. Their analyses ended up generating more heat than light because the commentators tackled their subject too directly, looking too quickly at the Roberts Court's outcomes. Those outcomes sort out along ideological lines neatly enough that the analysts find it all but impossible to more than attack or defend the Court along lines essentially, and demonstrably, political.

What we need is more in the way of indirect analysis, commentary that looks at the patterns of thought, the assumptions and preconceptions, that the Justices of the Roberts Court employ. It is in these jurisprudential patterns of thought that we can hope to ground evaluations of the Court's constitutional work that do not simply replicate our own or the Justices' political predispositions. This Article is meant as a modest contribution to this task of making jurisprudential sense—lawyers' sense—out of the decisions of the Roberts Court through the indirect approach of asking not what the Court held in constitutional cases, but rather how the Justices think about the practice of constitutional decisionmaking.

In Part I, this Article looks to the Court's recent decisions *District of Columbia v. Heller*<sup>8</sup> and *McDonald v. City of Chicago*<sup>9</sup> and finds the seeds of a new direction in judicial review of legislative and agency decisionmaking. Specifically, footnote 27 in Justice Scalia's majority opinion in *Heller*<sup>10</sup> and the majority's treatment of the dissent in *McDonald*<sup>11</sup> provide evidence that the Roberts Court is moving away

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8. 554 U.S. 570 (2008).

9. 561 U.S. \_\_\_, 130 S. Ct. 3020 (2010).

10. 554 U.S. at 628 n.27 ("Justice Breyer correctly notes that this law, like almost all laws, would pass rational-basis scrutiny. But rational-basis scrutiny is a mode of analysis we have used when evaluating laws under constitutional commands that are themselves prohibitions on irrational laws. In those cases, 'rational basis' is not just the standard of scrutiny, but the very substance of the constitutional guarantee. Obviously, the same test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms. If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect." (citations and internal quotation marks omitted)).

11. 561 U.S. at \_\_\_, 130 S. Ct. at 3048–50 (discussing Justice Breyer's arguments in dissent).

from current constitutional doctrines and towards a less onerous standard. The thesis of this Article is that the doctrinal vision of constitutional law, to which footnote 27 is an important clue, has profound implications for the role of constitutional law in our society. If the vision encapsulated in footnote 27 supplied the accepted presuppositions on which lawyers approach constitutional issues, the results would profoundly affect not only the specific outcomes the U.S. Supreme Court might reach, but also the overall role of constitutional law in the life of the Republic.

Parts II and III outline the key features of constitutional law, as currently practiced, that footnote 27 and *Engquist v. Oregon Department of Agriculture*<sup>12</sup> imply we should abandon. In Part II, this Article discusses the role of constitutional doctrine, judicial standards of scrutiny or modes of analysis that the Court creates in order to implement constitutional norms without claiming that the standards or modes of review are themselves identical to those norms. The distinction between the standard the Court employs and the underlying command the Court is enforcing gives rise to a “doctrinal gap.” The doctrinal gap is a central feature of constitutional thought that is also of great practical importance.

Part III discusses the significance of the doctrinal gap in argument over the authority of the Court’s constitutional decisions. If a precedent is understood to rest on a doctrinal basis rather than to involve the direct application of a constitutional norm, the Court has considerable freedom to follow the precedent, even if a majority of the Justices are unsympathetic to it as a matter of constitutional principle. A precedent that is equated to the content of the norm, in contrast, tends to stand or fall with the continuing existence of a majority that believes it to be correct.

Part IV turns to the significance of the doctrinal gap for our understanding of the roles of the judiciary and the political branches of government in the enforcement of the Constitution. This Part argues that the prevalence of the doctrinal gap in constitutional law creates an intellectual space for political-branch enforcement that recognizes the priority of the courts’ decisions. This Part then examines the idea of the doctrinal gap as applied to a famous rational-basis decision, *Williamson v. Lee Optical*,<sup>13</sup> and thus brings the reader back to the central claim of footnote 27, that rational-basis scrutiny gives rise to no doctrinal gap

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12. 553 U.S. 591 (2008).

13. 348 U.S. 483 (1954).

because it is a direct application of the constitutional norm it implements.

Part V suggests that footnote 27's attack on the doctrinal gap could lead to profound changes in current constitutional thought and practice, rendering judicial precedents more brittle and less stable, thereby undermining the independent role of the political branches in the implementation of the Constitution.

Part VI examines Justice Scalia's assertion in footnote 27 that constitutional commands enforced by rational-basis review "are themselves prohibitions on irrational laws."<sup>14</sup> Rational-basis review has traditionally assumed that in constitutional law, "rationality" has normative content. Rather than merely denoting the absence of blatant illogic, the requirement of rationality has included a prohibition on governmental actions that lack an independent, public-focused justification.<sup>15</sup> As Justice Scalia—and Chief Justice Roberts in his opinion for the Court in *Engquist*—understand constitutional rationality, this normative dimension vanishes, and the constitutional rule becomes a simple ban on purposeless or self-contradictory actions.<sup>16</sup>

Finally, Part VII reflects on how footnote 27, and the constitutional vision it embodies, fit into contemporary debate, and what they may say about the future of constitutional law in the era of the Roberts Court.

#### I. *MCDONALD* AND *HELLER* SIGNAL A NEW DIRECTION FOR JUDICIAL REVIEW OF LEGISLATIVE AND AGENCY DECISIONMAKING

Following what has become tradition, the U.S. Supreme Court handed down several long-awaited decisions on the last regular day of its 2009 Term, among them *McDonald v. City of Chicago*. *McDonald* held, by a 5–4 majority, that the individual right to bear arms recognized in 2008 in *District of Columbia v. Heller* constrains state and local governmental

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14. *Heller*, 554 U.S. at 628.

15. The Court's constitutional case law makes no systematic distinction of the type sometimes drawn between rationality in the sense of an absence of illogic and reasonability in the sense of conforming to some normative standard of what makes good sense. For a succinct discussion of the distinction, see JON ELSTER, *REASON AND RATIONALITY* 1–4 (Steven Rendall trans., 2009). Put in terms of this distinction, footnote 27 proposes that the constitutional rule prohibits only laws that are irrational, while this Article maintains that the traditional view is that the Constitution prohibits rational but unreasonable laws as well.

16. *Engquist*, 553 U.S. at 598 (resting decision on the "traditional view of the core concern of the Equal Protection Clause as a shield against arbitrary classifications").



action.<sup>17</sup> The Court acknowledged through its timing the Justices' awareness that the decision in *McDonald* was momentous and unavoidably controversial. Commentators obligingly treated the outcome as affording important clues to the purposes and future course of action of the Roberts Court.<sup>18</sup> Unfortunately, the commentators generally looked in the wrong direction by focusing on the fact that a majority upheld the gun-owners' claim. That the outcome in *McDonald*, like that in *Heller*, was of great human significance is undeniable—the extent to which law-abiding citizens can possess operational firearms is of life and death significance, although people argue over which side of that dichotomy is at stake.<sup>19</sup> But it is unclear that *McDonald*'s holding was particularly significant in a broader jurisprudential sense. Having decided in *Heller* that the Second Amendment protects an individual right to bear arms,<sup>20</sup> the further conclusion that it is “a provision of the Bill of Rights that protects a right that is fundamental from an American perspective”<sup>21</sup> and therefore “applies equally to the Federal Government

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17. The lead opinion in *McDonald*, written by Justice Alito, concluded that the Second Amendment right the Court found in *Heller* applies to the states because of its incorporation into the Due Process Clause of the Fourteenth Amendment. *McDonald v. City of Chicago*, 561 U.S. \_\_\_, 130 S. Ct. 3020, 3050 (2010). Justice Thomas reached the same outcome by way of the Privileges or Immunities Clause, and therefore did not join the sections of Alito's opinion rejecting the petitioners' argument based on that clause. *Id.* at 3059 (Thomas, J., concurring). Justices Stevens, Ginsburg, Breyer, and Sotomayor dissented. Most commentary on *McDonald* found this breakdown of the Justices in *McDonald* unsurprising in that it replicated the vote in *Heller*, except for the substitution of Sotomayor (a Democratic appointment to the Court) for Justice Souter (a “liberal” in contemporary journalistic usage).

18. See, e.g., Barry Friedman & Dahlia Lithwick, *Watch As We Make this Law Disappear*, SLATE, <http://www.slate.com/id/2269715/> (Oct. 4, 2010) (arguing that the McDonald outcome is evidence that the Roberts Court majority is successfully concealing an ideological agenda by sometimes reaching results that are supported by some “left wing intellectuals”); Adam Winkler, *The Supreme Court Under Chief Justice Roberts Moves Left*, DAILY BEAST, <http://www.thedailybeast.com/blogs-and-stories/2010-07-02/supreme-court-under-chief-justice-roberts-moves-left/> (July 2, 2010) (arguing that McDonald among other decisions shows that the Roberts Court is “not quite the extreme, right-wing court some people imagine it to be”).

19. Compare David Kopel, *A Chance to Fight Back*, N.Y. TIMES, <http://www.nytimes.com/roomfordebate/2011/01/11/more-guns-less-crime/a-chance-to-fight-back> (last updated Jan. 12, 2011, 11:41 PM) (lawful possession of individual firearms saves lives), with *Guns, Democracy, and Freedom*, COALITION TO STOP GUN VIOLENCE, <http://www.csgv.org/issues-and-campaigns/guns-democracy-and-freedom> (last visited May 3, 2011) (political campaign for right to bear arms results in “real violence in our country”).

20. The respondent municipalities in *McDonald* did not ask the Court to reconsider *Heller* and Justice Alito noted for the majority that “nothing written since *Heller* persuades us to reopen the question there decided.” *McDonald*, 561 U.S. \_\_\_, 130 S. Ct. at 3048. Justice Alito specifically had in mind the “question of original meaning” that the *Heller* majority thought determinative on the legal question of the Second Amendment's meaning.

21. *Id.* at 3050.

and the States,”<sup>22</sup> is plausible.<sup>23</sup> Whatever their societal importance, however, it is not the holding in *McDonald* or *Heller* that should be addressed, but rather a side-bar issue that appeared (in somewhat different forms) in both cases.

Justice Scalia’s opinion for the Court in *Heller* reached the substantive merits and held the District of Columbia’s handgun ordinance unconstitutional.<sup>24</sup> In contrast, in *McDonald*, the lower federal courts had thought themselves bound by old U.S. Supreme Court precedent to dismiss a right-to-bear-arms challenge to two local handgun laws. Justice Alito’s plurality opinion accordingly limited itself to deciding that the Second Amendment right, through its incorporation in the Fourteenth Amendment, is relevant to evaluating a local law’s constitutionality.<sup>25</sup> Whether the local ordinances are constitutional, and precisely what standard of review to apply in determining the answers, remains to be decided on remand.<sup>26</sup> Alito did, however, state two propositions that the plurality Justices presumably intend to bind future decisions. First, he reiterated the *Heller* Court’s express repudiation of any implication that the right to bear arms is absolute:

[O]ur holding did not cast doubt on such longstanding regulatory measures as “prohibitions on the possession of firearms by felons and the mentally ill,” “laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” We repeat those assurances here. Despite municipal respondents’ doomsday proclamations, incorporation does not imperil every law regulating firearms.<sup>27</sup>

Second, Alito countered Justice Breyer’s assertion in dissent that “incorporation will require judges to assess the costs and benefits of

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22. *Id.*

23. *Id.* at 3050. While *McDonald* does continue the incorporation process of applying the Bill of Rights to the states, that process has almost reached its logical end-point. As Justice Alito noted, only four provisions of the Bill of Rights remain unincorporated, *id.* at 3035 n.13, and two of those (the grand jury requirement of the fifth and the civil jury guarantee of the Seventh Amendment) are excluded from incorporation by “considerations of stare decisis” that he suggested would govern the Court if the issue should be raised. *Id.* at 3046.

24. *Dist. of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

25. *McDonald*, 561 U.S. at \_\_\_, 130 S. Ct. at 3050.

26. *Id.*

27. *Id.* at 3047 (citation omitted).

firearms restrictions and thus to make difficult empirical judgments in an area in which they lack expertise”.<sup>28</sup>

As we have noted, while [Justice Breyer’s] opinion in *Heller* recommended an interest-balancing test, the Court specifically rejected that suggestion. “The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.”<sup>29</sup>

Justice Breyer was unpersuaded. If the right is not absolute—and Justice Alito both affirmed that it is not and gave examples of gun control laws that might not violate it<sup>30</sup>—Breyer asked, how are courts to decide which laws are valid and which transgress the constitutional right?

In answering such questions judges cannot simply refer to judicial homilies, such as Blackstone’s 18th-century perception that a man’s home is his castle. Nor can the plurality so simply reject, by mere assertion, the fact that “incorporation will require judges to assess the costs and benefits of firearms restrictions.” How can the Court assess the strength of the government’s regulatory interests without addressing issues of empirical fact? How can the Court determine if a regulation is appropriately tailored without considering its impact?<sup>31</sup>

Alito’s examples of (potentially) valid regulations of gun possession, according to Breyer, have no basis other than the *ipse dixit* of the *McDonald* plurality and before that of the *Heller* majority:

[T]he Court has haphazardly created a few simple rules . . . . But why these rules and not others? Does the Court know that these regulations are justified by some special gun-related risk of death? In fact, the Court does not know. It has simply invented rules that sound sensible without being able to explain why or how Chicago’s handgun ban is different.<sup>32</sup>

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28. *Id.* at 3050.

29. *Id.* (emphasis in original) (citation omitted).

30. *Id.* at 3047 (“repeat[ing the] assurances” in *Heller* that “our holding d[oes] not cast doubt on such longstanding regulatory measures as ‘prohibitions on the possession of firearms by felons and the mentally ill,’ ‘laws forbidding the carrying of firearms in sensitive places . . . or laws imposing conditions and qualifications on the commercial sale of arms’” (citing *Dist. of Columbia v. Heller*, 554 U.S. 570, 625–28 (2008))).

31. *McDonald*, 561 U.S. at \_\_\_, 130 S. Ct. at 3127 (Breyer, J., dissenting).

32. *Id.* (citation omitted).

There is an unfortunate tone of asperity in these comments that might mislead the unwary reader into thinking that one side or the other is guilty of a lapse in judicial candor—that Justice Alito is hiding the ball or Justice Breyer is proposing that judges surreptitiously rewrite the Constitution’s commands—but either conclusion would be wrong. Alito and Breyer debated the question of how to think about a standard of review for legislation affecting Second Amendment rights because they disagree even more fundamentally, and as a matter of principle, over what constitutional law is and how judges are to understand their task in enforcing that law. Their debate over how to characterize the Second Amendment right is a clue, if a somewhat murky one, to the nature of this more profound disagreement.

In order to clarify what this deeper argument might be, it is useful to turn to an earlier exchange in *Heller*, which lays behind the remarks of Justices Alito and Breyer in *McDonald*. In *Heller*, Justice Scalia for the majority asserted that the district’s ordinance under review was unconstitutional “[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights . . . .”<sup>33</sup> Breyer in dissent responded that the ordinance “certainly would not be unconstitutional under, for example, a ‘rational basis’ standard,”<sup>34</sup> an observation that Justice Scalia addressed in footnote 27. Justice Scalia acknowledged that Breyer was correct that the Court would uphold the law under the familiar rational-basis test, but according to majority that was irrelevant:

[R]ational-basis scrutiny is a mode of analysis we have used when evaluating laws under constitutional commands that are themselves prohibitions on irrational laws. In those cases, “rational basis” is not just the standard of scrutiny, but the very substance of the constitutional guarantee. Obviously, the same test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms.<sup>35</sup>

The *Heller* dissenters ignored footnote 27, and so far it has attracted little attention from commentators, who generally have focused on the Second Amendment issues.<sup>36</sup> The footnote’s apparent obscurity is

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33. *Dist. of Columbia v. Heller*, 554 U.S. 570, 628–29 (2008).

34. *Id.* at 687 (Breyer, J., dissenting).

35. *Id.* at 628 n.27 (citation omitted).

36. See generally Brannon P. Denning & Glenn H. Reynolds, *Five Takes on District of Columbia v. Heller*, 69 OHIO ST. L.J. 671 (2008); Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278 (2009); Mark Tushnet, *Permissible Gun*

understandable, but a mistake, for it provides a deeply revealing window into how at least two key members of the Roberts Court—Justice Scalia and the Chief Justice himself—are attempting to reorient constitutional law as a whole.<sup>37</sup> The debate between Alito and Breyer in *McDonald* is only one of several indications from the October Term 2009 that this attempt is ongoing.<sup>38</sup>

The heart of this Article lies in the claim that footnote 27's seemingly offhand reference to the meaning of the rational-basis test indicates a much broader constitutional vision that animates key members of the Roberts Court. Rational-basis scrutiny, as traditionally understood, flows from a presupposition of American constitutionalism so basic and pervasive that it is easy to overlook: in its dealings with persons, the American government is under a constitutional obligation to act

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*Regulations After Heller: Speculations About Method and Outcomes*, 56 UCLA L. REV. 1425 (2009).

37. Footnote 27 is admittedly dicta, and at another place in his *Heller* opinion, Justice Scalia dismissed the importance of what he termed a "gratuitous" comment found in a footnote in an earlier case. *Heller*, 554 U.S. at 625 n.25 (citing *Lewis v. United States*, 445 U.S. 55, 65–66 n.8 (1980)). "It is inconceivable," Justice Scalia asserted, "that we would rest our interpretation of the basic meaning of any guarantee of the Bill of Rights upon such a footnoted dictum in a case where the point was not at issue and was not argued." *Heller*, 554 U.S. at 625 n.25. In this regard, it is ironic that footnote 27 quotes the famous footnote 4 of *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), in criticism of Justice Breyer. *Heller*, 554 U.S. at 628 n.27. Footnote 4, of course, was a classic example of footnoted dicta on a "point . . . not at issue and . . . not argued," and for precisely that reason Justice Frankfurter vehemently objected in a later case when other Justices suggested that footnote 4 represented a position endorsed by the Court. *Kovacs v. Cooper*, 336 U.S. 77, 90–91 (1949) (Frankfurter, J., concurring) ("A footnote hardly seems to be an appropriate way of announcing a new constitutional doctrine, and the *Carolene* footnote did not purport to announce any new doctrine . . ."). Despite Justice Frankfurter's protest, *that* footnote went on, of course, to become one of the best known and most influential statements in any judicial opinion in American history, which gives one pause in resting too much on the suggestion that footnoted dicta are of little importance. Footnote 27, in any event, is not the first example of Justice Scalia placing a major statement about constitutional law in a footnote. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (discussing role of tradition in constitutional analysis); cf. LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 97–98 (1991) ("Justice Scalia's footnote 6 . . . seems destined to take its place alongside Justice Stone's famous footnote 4 as one of constitutional law's most provocative asides . . ."). Today's dictum is tomorrow's *ratio decidendi*, footnote or not.

38. See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. \_\_\_, 130 S. Ct. 3138 (2010) (majority opinion of Roberts, C.J.) (applying novel principle to limit Congress's authority to impair the president's removal power); *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 560 U.S. \_\_\_, 130 S. Ct. 2592 (2010) (plurality opinion of Scalia, J.) (applying novel concept of a compensable judicial taking); *Citizens United v. FEC*, 558 U.S. \_\_\_, 130 S. Ct. 876 (2010) (overruling two major precedents on regulation of campaign finance); *id.* at 920 (Roberts, C.J., concurring) (explaining his willingness to overrule the precedents: "When considering whether to reexamine a prior erroneous holding, we must balance the importance of having constitutional questions *decided* against the importance of having them *decided right*." (emphasis in original)).

rationality. Rationality in turn requires both that public actions make sense and that they make *good* sense, that they have some legitimate purpose.<sup>39</sup> The constitutional law of liberty and equality is, in short, a mode of reasoning about what is rational in the public sphere—and rational in this broad and partly normative sense.<sup>40</sup> Footnote 27, consistent with arguments that Justice Scalia has advanced elsewhere<sup>41</sup> and that Chief Justice Roberts further explicated in an opinion issued shortly before *Heller*,<sup>42</sup> rests on a presupposition that is almost entirely the reverse. What makes good sense—what is a legitimate end as opposed to an illegitimate one—is a matter not for reason but for choice, and as such it ineluctably belongs to the world of politics. The Constitution, through the judicial enforcement of rules that are themselves the product of political will, may set bounds on this political domain but has no purchase within it. Constitutional law is a form of reasoning about the irrational, about the line that necessarily separates decisions that are susceptible to rule from those that are in the most literal sense arbitrary—the expression of the will.

## II. THE GAP BETWEEN CONSTITUTIONAL COMMAND AND JUDICIAL RULE DEFINES CONSTITUTIONAL DOCTRINE

Footnote 27's central assertion is that "'rational basis' is not just the standard of scrutiny" in cases where the Court properly employs it, but is "the very substance of the constitutional guarantee" itself.<sup>43</sup> The

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39. See the classic discussion in ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 37–38, 41 (Yale Univ. Press 2nd ed. 1986).

40. See, e.g., Andrew Koppelman, *DOMA, Romer, and Rationality*, 58 *DRAKE L. REV.* 923, 927–32 (2010) (discussing "the implicit normative premises of rational basis analysis"). The point is neither novel nor controversial. See Robert W. Bennett, "*Mere*" *Rationality in Constitutional Law: Judicial Review and Democratic Theory*, 67 *CALIF. L. REV.* 1049, 1056–57 (1979); Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 *CALIF. L. REV.* 341, 345–46 (1949).

41. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 1000–01 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (rejecting the "pronouncement of constitutional law [that] rests primarily on value judgments").

42. *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 603 (2008) (holding that in a public employment context, "the very discretion that . . . state officials are entrusted to exercise" precludes an equal protection challenge that the officials engaged in "the arbitrary singling out of a particular person").

43. Footnote 27 also claims that the U.S. Supreme Court does not employ the rational basis test when the "constitutional command" at issue is "a specific, enumerated right." Justice Breyer's invocation of the test was therefore entirely beside the point, because the Second Amendment is enumerated. Although this sounds like a truism—of course the flaccid rational basis test has no application when enumerated constitutional rights are at stake!—it is less self-evidently true than a careless reader might think. See H. Jefferson Powell, *Rational Basis and Enumerated Rights* (manuscript on file with author).

distinction Justice Scalia is drawing in this observation reflects the omnipresence of *doctrine* in constitutional law. The U.S. Supreme Court often announces, applies, or rejects constitutional doctrines—the standards or tests or modes of scrutiny or implementation that the Court employs in applying the Constitution to particular cases.<sup>44</sup> In terms of legal method, as Professor Henry Paul Monaghan pointed out in a seminal article, such doctrines involve “the creation of a common law substructure to carry out the purposes and policies” of the Constitution’s commands.<sup>45</sup> Like traditional common law decisionmaking, the creation of constitutional doctrine reflects a judicial evaluation and choice among competing means of executing the principles in question, although the Justices often do not comment on the rationales for (and against) particular doctrines.<sup>46</sup> This sort of second-order discussion, when it does occur, almost always confirms the “strategic” nature of doctrine: doctrinal formulations blend the Justices’ understanding of the Constitution’s meaning with the practicalities of judicial decisionmaking.<sup>47</sup> The following examples illustrate this theme.

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44. There is no single or canonical definition of “doctrine” in constitutional law, although in recent years a number of eminent constitutional scholars have devoted considerable effort to examining what aspects of constitutional law the term encompasses. *See generally* RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* (2001); Charles Fried, *Constitutional Doctrine*, 107 HARV. L. REV. 1140 (1994); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996). I am not using the word in any precise or highly theoretical sense. Professor Denning has written a valuable essay on this scholarship in relation to *Heller*. Brannon P. Denning, *The New Doctrinalism in Constitutional Scholarship and District of Columbia v. Heller*, 75 TENN. L. REV. 789 (2008).

45. Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 18 (1975). Monaghan argued that such doctrines ought to be subject to congressional modification. *Id.* at 3 (“[C]onstitutional common law [ought to be] subject to amendment, modification, or even reversal by Congress.”). The Court declined to adopt this view as to the *Miranda* warnings in *Dickerson v. United States*, 530 U.S. 428, 442 (2000), discussed *infra* at the text accompanying notes 63–67.

46. In addition to footnote 27, *Heller* contains an interesting back and forth between Justices Scalia and Breyer over Breyer’s answer to the question “[w]hat kind of constitutional standard *should* the Court use” in applying the Second Amendment? *Dist. of Columbia v. Heller*, 554 U.S. 570, 687 (2008) (Breyer, J., dissenting) (emphasis added). Justice Breyer argued that in practice any standard will “turn into an interest-balancing inquiry, with the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other,” and proposed “adopt[ing] such an interest-balancing inquiry explicitly.” *Id.* at 689. Justice Scalia responded that such “a freestanding ‘interest-balancing’ approach” would be unprecedented and contrary to the very purpose of the “enumeration of the right.” *Id.* at 634 (majority opinion).

47. For the adjective “strategic,” and an insightful study of this aspect of constitutional doctrine, see FALLON, *supra* note 44, at 5 (“[T]he Court devises and then implements strategies for enforcing constitutional values.”). Professor Fallon clearly does not intend, nor do I in adopting his terminology, any suggestion of ulterior, much less improper motivation on the Court’s part.

In *Grutter v. Bollinger*,<sup>48</sup> Justice O'Connor explained that the Court has ordained the use of strict scrutiny in equal protection cases involving explicit racial classifications in order to identify those situations in which classifications are in fact being used for a constitutionally improper purpose:

Absent searching judicial inquiry into the justification for such race-based measures, we have no way to determine what "classifications are benign or remedial and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." We apply strict scrutiny to all racial classifications to smoke out illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool. . . .

. . . .

. . . Strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context.<sup>49</sup>

Justice O'Connor's rationale, which she first articulated in the *City of Richmond v. J.A. Croson Co.*<sup>50</sup> decision years before, is quite different from that which Justice Kennedy stated in his concurrence in *Croson*. In *Croson*, Justice Kennedy wrote that in light of the Court's case law, strict scrutiny was the appropriate means to respect stare decisis while implementing what he saw as the Constitution's almost per se ban on racial classifications regardless of governmental purpose: "On the assumption that it will vindicate the principle of race neutrality found in the Equal Protection Clause, I accept the less absolute rule" of strict scrutiny.<sup>51</sup> Where Justice O'Connor saw strict scrutiny as an affirmative tool enabling the courts to uncover unconstitutional state action masquerading under a claim of legitimacy, Justice Kennedy perceived an underenforcement of the actual constitutional norm, acceptable only on the assumption that the shortfall in constitutional principle would be minimal.

In another setting, Justice Kennedy explained that his deliberate adoption of a standard not itself directly commanded by the

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48. 539 U.S. 306 (2002).

49. *Id.* at 326, 327 (majority opinion of O'Connor, J.) (alteration in original) (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion of O'Connor, J.)) (internal quotation marks omitted).

50. 488 U.S. 469 (1989).

51. *Croson*, 488 U.S. at 519 (Kennedy, J., concurring in part and in the judgment).



constitutional text rested on the need to reconcile constitutional commitments that are potentially in tension with one another. Writing for the Court in *City of Boerne v. Flores*,<sup>52</sup> Justice Kennedy explained his articulation of a new doctrinal standard by referring to the danger posed to one constitutional principle—Congress’s power to enforce the Fourteenth Amendment is a power to remedy or prevent violations of the amendment<sup>53</sup>—by another constitutional principle—Congress must have “wide latitude” to devise remedial legislation.<sup>54</sup>

There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive [i.e., not remedial] in operation and effect. History and our case law support drawing the distinction, one apparent from the text of the Amendment.<sup>55</sup>

The Constitution itself distinguishes the remedial legislation it authorizes from the substantive it does not; the test of congruence and proportionality is the means Justice Kennedy devised to enable the Court to police Congress’s (possibly innocent) tendency to overreach.<sup>56</sup>

What has been for many decades the Court’s standard explanation for rational-basis scrutiny in equal protection cases is very similar, only there the Court’s stated concern has been to police itself and other courts against overreaching into the constitutional domain of the legislature. Justice Thomas’s opinion for the Court in *FCC v. Beach Communications*<sup>57</sup> is typical:

This standard of review is a paradigm of judicial restraint. “The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.”<sup>58</sup>

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52. 521 U.S. 507 (1997).

53. *Id.* at 519.

54. *Id.* at 520.

55. *Id.*

56. Although Justice Kennedy commanded a near-unanimous Court in *City of Boerne* on this issue, the congruence and proportionality test is already under considerable strain, with Justice Scalia having expressly rejected it. *See Tennessee v. Lane*, 541 U.S. 509, 561–65 (2004) (Scalia, J., dissenting), discussed *infra* notes 80–84.

57. 508 U.S. 307 (1993).

58. *Id.* at 314 (quoting *Vance v. Bradley*, 440 U.S. 93, 97, 99 (1979)).

Justice Thomas continued, “Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.”<sup>59</sup> The rational-basis test, like the congruence and proportionality test, is instrumental or strategic, the means by which the judiciary avoids its own (doubtless innocent) temptation to correct unwise legislative choices.

In *Dickerson v. United States*,<sup>60</sup> the Court addressed the constitutionality of a 1968 statutory provision that was an unabashed congressional attempt to overrule the famous *Miranda v. Arizona*<sup>61</sup> decision. Language in post-*Miranda* opinions strongly implied that *Miranda* was not directly justified by the Constitution and, in dissent, Justice Scalia said as much. He insisted that the Court lacked the authority to invalidate the act of Congress, there being no violation of the Constitution.<sup>62</sup> For the Court, Chief Justice Rehnquist conceded that warnings required by *Miranda* are *not* “required by the Constitution, in the sense that nothing else will suffice to satisfy constitutional requirements”; the warnings were a strategic device created and imposed by the Court because the Justices believed existing practice ran an unacceptably high risk of permitting unconstitutional criminal convictions.<sup>63</sup> The fact that the warnings themselves are not directly commanded by the Constitution, however, did not make *Miranda* sub- or non-constitutional in nature. Such a decision is “a normal part of constitutional law”<sup>64</sup> and it “announced a constitutional rule”<sup>65</sup> that, unless changed by the Court, is as obligatory as the direct commands of the Constitution’s text.<sup>66</sup> Therefore, judge-made constitutional doctrine

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59. *Id.* at 315 (quoting *Lehnhusen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 365 (1973)).

60. 530 U.S. 428 (2000).

61. 384 U.S. 436 (1966).

62. *Dickerson*, 530 U.S. at 446 (Scalia, J., dissenting) (“[B]ecause a majority of the Court does not believe [that violating *Miranda* violates the Constitution, the Court] acts in plain violation of the Constitution when it denies effect to this Act of Congress.”).

63. *Dickerson*, 530 U.S. at 442.

64. *Id.* at 441.

65. *Id.* at 444.

66. Despite Justice Scalia’s characteristic vigor in expressing his disagreement with the *Dickerson* majority, *id.* at 457–61 (Scalia, J., dissenting) (attacking as “a lawless practice” the imposition of prophylactic rules that go beyond the actual substance of constitutional prohibitions), it is a mistake to read his *Dickerson* opinion as an outright rejection of doctrine. *See, e.g.*, *Maryland v. Shatzer*, 559 U.S. \_\_\_, 130 S. Ct. 1213, 1220–24 (2010) (majority opinion of Scalia, J.) (adopting, after considering benefits and costs of various rules, a fourteen-day presumption that a confession is involuntary under *Edwards v. Arizona* after a break in custody); *Montejo v. Louisiana*, 556 U.S. \_\_\_, 129 S. Ct. 2079, 2089 (2009) (majority opinion of Scalia, J.) (discussing the proper

can impose restrictions on other governmental entities that go beyond what the Constitution itself directly requires where, in the Court's view, doing so is necessary to protect a constitutional norm.

The Justices agree—or at least they agreed before footnote 27 in *Heller*—that constitutional doctrine is strategic. In other words, the Court crafts doctrinal rules in light of the Justices' perceptions of the courts' capabilities, the practical consequences of adopting (or failing to adopt) the rule, and the likelihood in the given circumstances that there has been an actual violation of the Constitution. There is, then, a gap between what the direct command of the Constitution literally requires, what *must* of necessity be done by the courts or other entities “to satisfy [the letter of the] constitutional requirements,”<sup>67</sup> and what the Court deems appropriate or even essential in the enforcement of those requirements. It is the existence of this gap between constitutional command and judicial rule, in a sense, that defines constitutional doctrine.

### III. THE OPERATION OF STARE DECISIS DEPENDS UPON WHETHER THE ISSUE IS FRAMED AS ONE OF “FAULTY DOCTRINE” OR “ERRONEOUS INTERPRETATION”

The obvious question at this point is whether there is anything more than theoretical significance to the fact that constitutional doctrine is characterized by the admitted doctrinal gap between its content and the Constitution's direct commands. At first glance, *Dickerson* might seem to eliminate any practical distinction between a rule or standard that the Constitution literally requires and a rule or standard that is the product of the Court's doctrinal creativity. The latter, so long as the Court adheres to it, is as binding as the former.<sup>68</sup> If the Court recognizes no pragmatic

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reasoning to apply “[w]hen this Court creates a prophylactic rule in order to protect a constitutional right”); *United States v. Virginia*, 518 U.S. 515, 568 (1995) (Scalia, J., dissenting) (“I have no problem with a system of abstract tests such as rational basis, intermediate, and strict scrutiny (though I think we can do better than applying strict scrutiny and intermediate scrutiny whenever we feel like it). Such formulas are essential to evaluating whether the new restrictions that a changing society constantly imposes upon private conduct comport with that ‘equal protection’ our society has always accorded in the past.”).

67. *Dickerson*, 530 U.S. at 442.

68. *Dickerson* is a particularly striking case in this regard because *Miranda* itself had acknowledged that there might be other, legislative means of insuring against the constitutional violations that the *Miranda* warnings were meant to prevent. This is an unusual admission by the Court that the very doctrine it was creating was contingent and subject to political rethinking. The statutory provision that Congress enacted, however, was simply an attempt to restore the legal test that the *Miranda* Court had found inadequate to protect the constitutional norms—it was, in short,

distinction between the Constitution's commands and its own doctrinal elaborations, footnote 27's equation of command and doctrine in the context of rational-basis scrutiny might seem of no real significance. In fact, however, the doctrinal gap plays a critical role in the judicial elaboration of constitutional law because of its significance in the application of stare decisis.

Any sensible resolution of the difficult question of when the Court should overrule constitutional precedent has to depend, in part, on whether the challenge to the precedent rests on the claim that the earlier Court misunderstood the Constitution itself, or instead that the doctrinal strategy it adopted for implementing the Constitution turned out to be faulty. Justice Kennedy's concurring opinion in *Croson* expressly recognized the possibility that he might subsequently rethink his willingness to employ strict scrutiny in the analysis of affirmative action programs.<sup>69</sup> He concurred in the Court's use of strict scrutiny, which is a doctrinal tool that is less absolute than a per se ban on racial classifications, on the assumption that strict scrutiny would "vindicate the principle of race neutrality found in the Equal Protection Clause."<sup>70</sup> If in practice strict scrutiny proved to allow uses of race that undermined that principle, Justice Kennedy was prepared to discard the doctrine notwithstanding stare decisis.<sup>71</sup> The sort of argument relevant to persuading Justice Kennedy to act on this announced reservation would concern not the meaning of equal protection, but the practical results of applying strict scrutiny.

Justices are not usually so explicit about the possible problems with the doctrine they are announcing, but a reservation similar to Justice Kennedy's in *Croson* is implicit in every explanation of a Justice's or the Court's adoption of a particular doctrine. Consider Justice O'Connor's doctrinal explanation in *Grutter*, which quoted from her *Croson* opinion announcing strict scrutiny as the test for evaluating race-based affirmative action.<sup>72</sup> The rationale for using the test, she wrote, is that it

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an attempt by Congress to overrule the Court rather than to meet the Court's concerns in some other fashion.

69. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 519 (1989) (Kennedy, J., concurring in part and concurring in the judgment) ("On the assumption that [strict scrutiny] will vindicate the principle of race neutrality" concluding that "I am not convinced we need adopt [a per se rule] at this point.").

70. *Id.*

71. *Id.*

72. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (quoting *Croson*, 488 U.S. at 493). To be precise, *Croson* adopted strict scrutiny for state and local-governmental use of race in affirmative

“provide[s] a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker,”<sup>73</sup> thus enabling the courts “to ‘smoke out’ illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool.”<sup>74</sup> Implicit in this reasoning is the reservation that Justice O’Connor (or the Court) would adopt a different approach if strict scrutiny were shown to be inadequate or misguided as a means of “smoking out” illegitimate uses of race.<sup>75</sup>

In *Croson*, Justice O’Connor’s rationale for employing strict scrutiny seems to rely on an underlying view of equal protection that identifies the intentional or purposeful infliction of harm as the primary concern of equal protection with respect to race—strict scrutiny “smokes out” concealed purposes of that prohibited kind—while Justice Kennedy’s concurrence identifies “race neutrality” as the constitutional principle at stake. The arguments crafted to convince Justice O’Connor that she adopt Justice Kennedy’s interpretation of the Constitution<sup>76</sup>—or that Justice Kennedy adopt Justice O’Connor’s—would be quite different from those crafted merely to convince either to adopt a different doctrinal approach in order to implement an understanding of the constitutional norm that remained unchanged. Because of the presence of the doctrinal gap, for either Justice to modify or even abandon strict scrutiny as the appropriate test in affirmative action cases would be nothing more than what Chief Justice Rehnquist in *Dickerson* called “the sort of modifications” that are “a normal part of constitutional law” because “no constitutional rule is immutable.”<sup>77</sup>

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action. The later *Adarand* decision, in an opinion also written by Justice O’Connor applied the test to federal actions. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995).

73. *Grutter*, 539 U.S. at 327.

74. *Id.* at 326 (alteration in original) (quoting *Croson*, 488 U.S. at 493) (internal quotation marks omitted).

75. There is an interesting ambiguity in Justice O’Connor’s explanation. Her reference to strict scrutiny determining whether the government has “a goal important enough to warrant use of a highly suspect tool” suggests a quite different rationale for using this doctrine: a direct weighing of the importance of the governmental purpose—*ex hypothesi* legitimate or benign as opposed to covertly malicious—against the harm to constitutional values. *See id.* at 327.

76. Her language suggesting that strict scrutiny balances governmental purpose against individual interest makes it slightly unclear what Justice O’Connor’s understanding of the underlying constitutional norm is, but the predominant impression, I think, is that created by her invocation of the “smoking out” metaphor.

77. *Dickerson v. United States*, 530 U.S. 428, 441 (2000). As the Chief Justice noted, “No court laying down a general rule can possibly foresee the various circumstances in which counsel will seek to apply it.” *Id.* *Dickerson* reminds us that because of *stare decisis*, the burden of persuading a Justice or the Court to abandon altogether a doctrine is considerably greater than is required to convince the Court to make adjustments to the doctrine.

Justice Scalia's changing view of the congruence and proportionality test adopted in *City of Boerne* is a good example of a Justice responding to later experience that, in his view, shows a doctrinal approach to be misguided. Justice Scalia joined Justice Kennedy's opinion for the Court without any stated reservation about the new doctrinal formulation,<sup>78</sup> although in a later opinion, he stated that he joined in the *City of Boerne* opinion "with some misgiving . . . because [such tests] have a way of turning into vehicles for the implementation of individual judges' policy preferences."<sup>79</sup> But in *Tennessee v. Lane*,<sup>80</sup> the second of two decisions<sup>81</sup> that he thought failed to respect the underlying constitutional norm despite their application of the test, Justice Scalia announced a change of position:

I yield to the lessons of experience. The "congruence and proportionality" standard, like all such flabby tests, is a standing invitation to judicial arbitrariness and policy-driven decisionmaking. . . .

I would replace "congruence and proportionality" with another test—one that provides a clear, enforceable limitation supported by the text of § 5.<sup>82</sup>

As he made clear in his opinion in *Lane*, Justice Scalia continued to agree with the *City of Boerne* Court's interpretation of the constitutional norm governing Congress's exercise of the power to enforce the Fourteenth Amendment; it was the doctrinal approach in that decision, not its understanding of the amendment, that he concluded was faulty.<sup>83</sup>

In contrast, an argument aimed at convincing Justices that they should repudiate or substantially modify parts of their understandings of the Constitution itself asks them to confess error on an altogether more fundamental level. Such arguments are, unsurprisingly, rarely successful. Even more rarely do Justices admit that they have changed their minds at the level of underlying constitutional understanding. The

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78. Justice Scalia declined to join one subsection of Justice Kennedy's opinion, dealing with the legislative history in Congress of Section 5 of the Fourteenth Amendment, but stated no concerns with the substance of the congruence and proportionality test. *City of Boerne v. Flores*, 520 U.S. 507, 511 n.\* (1997).

79. *Tennessee v. Lane*, 541 U.S. 509, 556 (2004) (Scalia, J., dissenting).

80. 541 U.S. 509 (2004).

81. The other decision was *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003).

82. *Lane*, 541 U.S. at 557–58.

83. Justice Scalia's explanation of his proposed replacement for the *City of Boerne* test is an unusually explicit discussion of the process by which a Justice reaches a doctrinal position. *See id.* at 561–65 (Scalia, J., dissenting).

Court itself, as a corporate body, does admit to error of this sort with some frequency, but as a matter of fact such shifts in interpretation usually reflect changes in the Court's membership rather than in the individual Justices' mindsets.

The doctrinal gap between the Court's articulation of the case law that implements the Constitution, and the Justices' often conflicting views on the meaning of the Constitution itself, marks for most purposes the boundary between the domain of legal arguments that might plausibly lead to a change in the Court's position, and that area in which the Justices' commitments to their vision of constitutional principle are too deep to change. In the realm of doctrine, the presence of strategic considerations makes constitutional law fluid, flexible, and open to the sorts of change and adjustment that Chief Justice Rehnquist called "a normal part of constitutional law."<sup>84</sup> On the other hand, the latter realm of principled commitment to underlying constitutional meaning is relatively static, fixed by the divergent visions of individual Justices that are shaped largely by what the great Chief Justice John Marshall called "the wishes, the affections, and the general theories" of the individual.<sup>85</sup> Because such factors are far more deeply a part of the individual, they are far less susceptible to change.<sup>86</sup> Where there is little or no doctrinal

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84. *Dickerson v. United States*, 530 U.S. 428, 441 (2000).

85. JOHN MARSHALL, 4 *LIFE OF GEORGE WASHINGTON* 394 (The Citizens Guild 1926) (1805). One of Marshall's most distinguished successors, Charles Evans Hughes, is reported to have made a very similar point: "'At the constitutional level where we work, ninety percent of any decision is emotional. The rational part of us supplies the reasons for supporting our predilections.'" WILLIAM O. DOUGLAS, *THE COURT YEARS, 1939 TO 1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS* 8 (Random House ed., 1980) (quoting Charles Evans Hughes).

86. Individual Justices (and other constitutionalists) differ not only in the substance of their commitments but in the range of constitutional issues about which they hold fixed as opposed to fluid views. Justices who have relatively small areas of constitutional law in which they have deep commitments about underlying meaning, or whose commitments are more complex (or confused, according to their critics), notoriously can enjoy a disproportionate sway over the Court's outcomes because far more cases end up for them on the flexible, fluid side of the doctrinal gap. One thinks of Justice Powell on the Burger Court, Justice O'Connor on the Rehnquist Court, and, perhaps, Justice Kennedy on the Roberts Court. Commentators tend to lump such "swing-vote" Justices together as exemplars of a common characteristic, with the commentators divided over whether the Justices' behavior is admirably judicious or hopelessly inconsistent. *See, e.g.*, Douglas M. Parker, *Justice Kennedy: The Swing Voter and His Critics*, 11 *GREEN BAG* 2D 317 (2008) (discussing claims that Justice Kennedy is inconsistent); C. Lincoln Combs, *A Curious Choice: Hibbs v. Winn as a Case Study of Sandra Day O'Connor's Balancing Jurisprudence*, 37 *ARIZ. ST. L.J.* 183, 192 (2005) ("Justice O'Connor's jurisprudential style has been called many things: accommodationist, marginalist, pragmatic, inconsistent, and unpredictable. Perhaps the best way to describe her judicial analysis is 'balancing.'"); Paul W. Kahn, *The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 *YALE L.J.* 1 (1987) (arguing that "Powell's balancing approach confused the role of juror and Justice, the role of legislator and Justice, and ultimately the role of citizen and Justice"). My own view is that the mere fact that a Justice seems often to be the "swing

gap between the Court's approach to deciding particular issues and the Justices' underlying constitutional commitments, precedent tends to be brittle—hard and unyielding insofar as it commands five votes, while susceptible to unconvincing “application” or simple repudiation when it lacks, or loses, a consistent majority.

#### IV. DOCTRINAL DECISIONS AND EXTRAJUDICIAL CONSTITUTIONAL INTERPRETATION

The distinction between constitutional doctrine and the commands of the Constitution that doctrine is meant to implement is not only important for its role in the Court's dealings with its own precedents. It is equally or even more important for the part it plays in defining the role of the political branches of government as constitutional interpreters. Footnote 27's reconstruction of the relationship between rational-basis scrutiny and the underlying constitutional rule has profound implications for the role of the political branches in the implementation of the Constitution: the footnote implicitly discards one of the most important points in contemporary constitutional law where political-branch implementation can play a role.<sup>87</sup>

##### A. *The Non-Exclusivity of the Judicial Power to “Say What (Constitutional) Law Is”*

In theory at least, it would be possible to treat the Constitution as the concern solely of the judiciary. Other governmental actors (legislatures, high executive officers, administrators, police officers) would be normatively free to do whatever they thought best, with the Constitution and the judiciary's enforcement of it as solely a matter of external constraint. On this view, if other governmental actors (legislature, executive, etc.) can get away with X without interference from the courts, the Constitution itself should give them no other pause: it is the

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vote” says little in itself other than that the Court is polarized over issues about which the Justice in question often does not have a broad and unyielding commitment on the question of underlying constitutional meaning.

87. I am not concerned in this Article with the related but distinct issue of the executive branch's obligation to enforce federal-court judgments even when the Executive conscientiously believes that the court is in error. While that question is apparently of great interest to scholars, see, for example, William Baude, *The Judgment Power*, 96 GEO. L.J. 1807 (2008), I believe that it is settled, and rightly so, as a matter of judicial and executive practice. H. JEFFERSON POWELL, A COMMUNITY BUILT ON WORDS 127 (2003) (referring to the almost “unbroken tradition of executive branch implementation of judicial decisions”); *id.* at 207 (“American executive officers must obey judicial orders, at least once affirmed at the highest level.”).



judges' concern, not theirs. Some people think the American system was designed this way, and many more believe (or fear) that it is the American norm in practice.<sup>88</sup> From this perspective, the Constitution stands to governmental officials, other than judges, roughly as the Internal Revenue Code does to taxpayers. There are rules that the taxpayer must not transgress, on pain of external sanction, but as long as he stays within those rules the taxpayer owes no further regard to the purposes of the Code. As Judge Learned Hand wrote, "Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes."<sup>89</sup> The Code imposes no internal obligations.

On the analogous view of the Constitution, governmental officials (except judges—but why are they different?) owe nothing to the Constitution for its own sake, except the duty to obey judicial orders issued in the Constitution's name (but, again, why?). The domain of politics and the domain of constitutional principle have only one necessary point of contact: the constitutional domain sets bounds on the political branches. Beyond respecting orders policing that boundary, political decisionmakers may simply ignore the Constitution and its judicial guardians. There is no need for political actors to interpret the Constitution or concern themselves independently with its implementation. The only constitutional advice a lawyer could really give a legislator or executive officer would be a prediction about whether the courts would interfere, and if so what the courts would be likely to do. This perspective treats non-judicial officials as if they were supposed to behave like Holmes's famous Bad Man, interested only in predicting what penalties, if any, their conduct might incur.<sup>90</sup>

The Constitution as an "Internal Revenue Code" dovetails nicely with the U.S. Supreme Court as a constitutional oracle, a position usually associated, perhaps unfairly, with the opinion in *Cooper v. Aaron*.<sup>91</sup> *Cooper*, signed by all nine Justices, famously asserted:

[T]he interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* [*v. Board of Education*] case is the supreme law of the land, and Art. VI of the Constitution makes

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88. For a recent searching discussion of this subject in the context of habeas corpus suspension, see Trevor W. Morrison, *Suspension and the Extrajudicial Constitution*, 107 COLUM. L. REV. 1533 (2007).

89. *Helvering v. Gregory*, 69 F.2d 809, 810 (2d Cir. 1934) (Hand, J.), *aff'd*, 293 U.S. 465 (1935).

90. See O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

91. 358 U.S. 1 (1958).

it of binding effect on the States ‘any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.’”<sup>92</sup>

If the political branches of government have no role in determining the meaning and implementation of the Constitution, those activities fall by default into judicial hands and, given the hierarchical nature of the American judiciary, that means the Supreme Court of the United States. There is no mystery about the obligation to give *Miranda* warnings or desegregate schools; the Court’s decisions define both as constitutional obligations, period. With regard to whatever the Court deems to be a constitutional matter, its views exhaustively address any questions. There is no normative space, as it were, for political actors to interpret the Constitution or concern themselves with its implementation beyond obeying court orders, for to do so would be to usurp the exclusive role of the judiciary.<sup>93</sup> Judicial enforcement defines constitutional obligation.

As a historical matter, however, this perspective on the Constitution is clearly not the best understanding of the American constitutional tradition. At the simplest level, it implies an eviscerated view of the constitutional oath required of all American governmental officers that directly contradicts part of the reasoning by which John Marshall defended the power of judicial review in *Marbury v. Madison*.<sup>94</sup> There are those who believe that the oath is nothing more than a pledge of allegiance to the American political system,<sup>95</sup> but the mainstream view has been that legislators and executive officials have an independent duty to interpret and implement the Constitution.<sup>96</sup> Evidence to this effect is not difficult to find: *City of Boerne* aimed to curb congressional overzealousness in promoting legislative views of the Constitution’s

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92. *Id.* at 18. In the context of *Cooper*, the Justices’ immediate point was to reject the legitimacy of any attempt by state governmental officials to interfere with federal-court desegregation orders and perhaps they meant only the point *Dickerson* was to make decades later, that political actors cannot “supersede [the Court’s] decisions interpreting and applying the Constitution,” except of course through the amendment process. *Dickerson v. United States*, 530 U.S. 428, 437 (2000).

93. Obviously someone holding this view would need to nuance it considerably to address such practical issues as constitutional questions not yet addressed by the judiciary, situations in which it might seem clear what the courts would rule but unclear that any court would actually be able to entertain a case allowing a ruling, and the interpretation of ambiguities in judicial decisions. We can leave to one side these issues for resolution by the advocates of an imperial judiciary.

94. 5 U.S. (1 Cranch) 137 (1803).

95. On this issue, see H. JEFFERSON POWELL, CONSTITUTIONAL CONSCIENCE 3–6 (2008).

96. See Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 200 (1994) (“There will be some occasions [when] the President can and should exercise his independent judgment to determine whether the statute is constitutional.”).

meaning.<sup>97</sup> In doing so, however, the Court stated its respect for Congress's exercise of the authority to construe and apply the Constitution:

In 1789, when a Member of the House of Representatives objected to a debate on the constitutionality of legislation based on the theory that "it would be officious" to consider the constitutionality of a measure that did not affect the House, James Madison explained that "it is incontrovertibly of as much importance to this branch of the Government as to any other, that the constitution should be preserved entire. It is our duty."<sup>98</sup>

President Madison took the same view of the executive branch's relation to the Constitution,<sup>99</sup> but this observation does not depend on his admittedly huge stature as a constitutionalist. From the beginning, the almost universal acceptance by Americans of judicial review has gone hand-in-hand with a widespread understanding that other governmental officials have a duty to govern themselves by the Constitution and not merely to avoid constitutional entanglements with the courts.

### *B. Doctrinal Underenforcement of the Constitution*

What this Article calls the "doctrinal gap," the distinction between the doctrines that the judiciary follows in its exercise of judicial review and the commands of the Constitution in itself, is a primary source of the normative space in which political actors can and should undertake their own task of constitutional review (or self-review).<sup>100</sup> For example,

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97. See *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 728 (2003) ("City of Boerne also confirmed . . . that it falls to this Court, not Congress, to define the substance of constitutional guarantees. . . . We distinguish appropriate prophylactic legislation from 'substantive redefinition of the Fourteenth Amendment right at issue' by applying the test set forth in *City of Boerne*." (citation omitted)).

98. *City of Boerne v. Flores*, 521 U.S. 521, 535 (1997) (citing 1 ANNALS OF CONG. 500 (1789)).

99. See H. Jefferson Powell, *Law as a Tool*, in *LAW AND DEMOCRACY IN THE EMPIRE OF FORCE* 250–64 (H. Jefferson Powell & James Boyd White eds. 2009).

100. This is, to be sure, fully the case only when judicial doctrine falls short of full enforcement of the actual constitutional norm. Where, as in the *Miranda* rule upheld in *Dickerson*, doctrine limits political action beyond what the Constitution itself directly requires, different considerations apply. *Dickerson* and *City of Boerne* (both of which invalidated acts of Congress passed in direct response to constitutional decisions by the Court) make it clear that the Court will not acquiesce in simple attempts by Congress to replace in practice the Court's constitutional views with the legislature's, but it does not follow that there is no normative space for independent political-branch constitutional interpretation in situations of judicial "overenforcement." *Miranda* expressly contemplated the possibility of other, legislatively ordained means for securing the constitutional principles at stake other than by the Court's prescribed warnings. *Miranda v. Arizona*, 384 U.S. 436, 467 (1966); see *Dickerson v. United States*, 530 U.S. 428, 440–42 (2000) (discussing why the congressional response failed to satisfy the *Miranda* Court's concerns). Perhaps "the *Miranda*

Congress's power to spend money, the Court has said, is limited by several "general restrictions," the first of which "is derived from the language of the Constitution itself: the exercise of the spending power must be in pursuit of 'the general welfare.'"<sup>101</sup> As the Court has noted, "The level of deference" that courts must give "to the congressional decision [whether an expenditure is for the general welfare] is such that the Court has . . . questioned whether 'general welfare' is a judicially enforceable restriction at all."<sup>102</sup> In fact, while the Court has not gone quite so far as to deem the issue a non-justiciable political question,<sup>103</sup> two things are nonetheless clear: the spending power is constitutionally limited by the requirement that it serve the general welfare *and* it is Congress (and the President through exercise of the veto power) that is primarily charged with the responsibility of enforcing the constitutional limitation. Judicial doctrine, which in this area employs a quite sensible rule of deference to congressional judgments about what expenditures are in the national interest, leaves a very substantial area in which the constitutional limitation at issue must be implemented by the political branches or else go unobserved.

The best known argument resting on this observation is probably Lawrence Sager's 1978 article on the judicial underenforcement of constitutional norms.<sup>104</sup> In contrast to what he viewed as the prevailing assumption that "the legal scope of a constitutional norm [is] inevitably coterminous with the scope of its federal judicial enforcement," Dean Sager argued that "governmental officials are legally obligated to obey the full scope of constitutional norms which are underenforced by the federal courts . . . ."<sup>105</sup> The Equal Protection Clause, in his view,

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Court's invitation for legislative action," *Dickerson*, 530 U.S. at 440, is implicit in any situation where the Court announces doctrine that is prophylactic in nature.

101. *South Dakota v. Dole*, 483 U.S. 203, 207 & n.2 (1987).

102. *Id.*

103. The per curiam opinion in *Buckley v. Valeo*, 424 U.S. 1 (1976), arguably reached that conclusion. *See id.* at 90 ("It is for Congress to decide which expenditures will promote the general welfare."). But if so, *Dole* marked a slight retreat, both in terms of the Court's language ("courts should defer substantially") and its actions (the Court briefly but substantively considered whether the act of Congress under review was "reasonably calculated to advance the general welfare"). 483 U.S. at 207, 208.

104. Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978). Dean Sager perhaps underestimated the extent to which his was in fact an elegant *restatement* of a long-standing if rather inchoate presupposition of mainstream constitutional thought that two other important scholars had already identified. *See* Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 594–99 (1975); Monaghan, *supra* note 45.

105. Sager, *supra* note 104, at 1213, 1264.

provides a clear example of such underenforcement, because the general or default doctrine that applies to most equal protection challenges is the extremely permissive rational-basis test. Under that test, “only a small part of the universe of plausible claims of unequal and unjust treatment by government is seriously considered by the federal courts; the vast majority of such claims are dismissed out of hand.” In Sager’s view, we depend upon “other governmental actors for the preservation of the principles embodied in ” the Equal Protection Clause.<sup>106</sup>

Dean Sager’s article has been influential,<sup>107</sup> and justly so, as a powerful interpretation of central aspects of modern equal protection doctrine. In doing so, Sager suggested a means for identifying a proper role for political-branch constitutional interpretation and implementation: Congress and the Executive have a special responsibility to safeguard the Constitution’s norms where those norms are not or cannot be fully protected by judicial review. As a formal legal opinion issued by the Department of Justice in 1996 put it:

The conclusion that a particular provision of proposed legislation probably would not be held unconstitutional by the courts is not equivalent to a determination that the legislation is constitutional per se. The judiciary is limited, properly, in its ability to enforce the Constitution, both by Article III’s requirements of jurisdiction and justiciability and by the obligation to defer to the political branches in cases of doubt or where Congress or the President has special constitutional responsibility. In such situations, the executive branch’s regular obligation to ensure, to the full extent of its ability, that constitutional requirements are respected is heightened by the absence or reduced presence of the courts’ ordinary guardianship of the Constitution’s requirements.<sup>108</sup>

Parallel observations about the constitutional responsibilities of Congress and state governments would be equally apposite. The

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106. *Id.* at 1263. Sager cited “the due process clause of the fourteenth amendment [sic], particularly in its substantive application,” *id.* at 1220, as another good example of an underenforced norm, presumably because the general or default doctrinal inquiry in substantive due process cases is, once again, the rational-basis test.

107. Professor Fallon—himself a major voice in constitutional scholarship—has recently listed Sager’s *Fair Measure* as one of those “works that are almost universally regarded as being of highest quality.” Richard H. Fallon, Jr., *Why and How to Teach Federal Courts Today*, 53 ST. LOUIS U. L.J. 693, 707 (2009).

108. The Constitutional Separation of Powers Between the President and Congress, 20 Op. O.L.C. 124, 180 (1996). This opinion was written by the distinguished constitutional scholar Walter Dellinger, then serving as the Assistant Attorney General in charge of the Office of Legal Counsel, and thus one of the President’s chief legal advisors.

normative space that exists between the Constitution's actual commands and U.S. Supreme Court doctrine that underenforces those commands can be, and pursuant to their oaths ought to be, occupied by the constitutional decisions of non-judicial officials.<sup>109</sup>

C. *Williamson v. Lee Optical Is an Example of Judicial Underenforcement Through Rational-Basis Scrutiny*

A concrete example of judicial underenforcement through rational-basis scrutiny is useful at this point. Consider a staple of Constitutional Law I classes, *Williamson v. Lee Optical*. Opticians challenged an Oklahoma statute that made it unlawful for anyone other than a licensed optometrist or ophthalmologist “to fit lenses to a face or to duplicate or replace into frames lenses or other optical appliances, except upon written prescriptive authority of an Oklahoma licensed ophthalmologist or optometrist.”<sup>110</sup> The district court concluded that because the law “prohibit[ed] the wearers of eyeglasses from exchanging their frames either to obtain more modern designs or because the former frames are broken, without first visiting an ophthalmologist or optometrist,” the law’s practical effect was to “divert[] from the optician a very substantial, as well as profitable, part of his business.”<sup>111</sup> Because “the knowledge necessary to perform these services is strictly artisan in character and can skillfully and accurately be performed without the professional knowledge and training essential to qualify as a licensed optometrist or ophthalmologist,” the district court held that the statute was “unreasonable and discriminatory” and violated both the Due Process and the Equal Protection Clauses.<sup>112</sup>

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109. Dean Sager believed that state courts should be included in the list of constitutional actors with the duty and authority to act in the doctrinal gap created by federal-court underenforcement. Sager, *supra* note 104, at 1242–63. The U.S. Supreme Court appears to have rejected that view. *See, e.g., Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461 n.6 (1981) (“[W]hen a state court reviews state legislation challenged as violative of the Fourteenth Amendment, it is not free to impose greater restrictions as a matter of federal constitutional law than this Court has imposed.”). Whether the Court was right to do so is beyond the scope of this Article.

110. *Williamson v. Lee Optical*, 348 U.S. 483, 485 (1955). The case also involved a separate claim by an ophthalmologist who challenged a section of the statute that prohibited kickbacks and related conduct. The district court rejected his claim, the U.S. Supreme Court affirmed, and no one today has any interest in that part of the decision. I have passed over other details that, like the out-of-luck ophthalmologist’s argument, are of no current concern.

111. *Lee Optical v. Williamson*, 120 F. Supp. 128, 135 (D.C. Okla. 1954) (three-judge court), *aff’d in part and rev’d in part*, 348 U.S. 483 (1955).

112. *Id.* at 135, 139.

The district court clearly thought the statute was what later economic jargon would term rent-seeking legislation, a successful attempt by the ophthalmologists and optometrists to appropriate part of the opticians' business through manipulation of the legislative process, with no public-focused purpose at all.<sup>113</sup> The conclusion that, on those facts, the law was invalid seems entirely defensible, at least on the assumption that statutory classifications and intrusions on liberty must serve some legitimate *public* purpose.<sup>114</sup>

A unanimous U.S. Supreme Court reversed in an opinion written by Justice Douglas. The Court was not in the dark about the unmistakable economic effect, and no doubt the *sub rosa* intended purpose of the instigators, of the law under review.<sup>115</sup> Indeed, it hardly requires a close reading of his text to sense that Douglas drafted his opinion to protect the Court, or himself, from any charge of naïveté. "The Oklahoma law may exact a needless, wasteful requirement in many cases," Douglas conceded, but added:

The legislature *might* have concluded that [situations where it is not are common enough] to justify this regulation of the fitting of eyeglasses. . . . [T]he legislature *might* have concluded that [an examination by an ophthalmologist or optometrist] was needed often enough to require one in every case. . . . To be

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113. See Chris M. Franchetti, *Not Seeing Eye to Eye: Chapter 8 and the Battle Over Prescription Eyewear*, 30 MCGEORGE L. REV. 474, 475–76 (1999) ("[T]he optical industry, understandably, is highly competitive. However, as partially evidenced by the infamous controversy which gave rise to *Williamson v. Lee Optical* in 1955, such vigorous competition may be less than healthy. For decades, various industry participants have battled for control of eyewear sales, producing government investigations, lawsuits, and allegedly unethical political influence in the process.").

114. The Court of the 1950s accepted this principle. See, e.g., *Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954) ("Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective.").

115. Justice Douglas himself was an experienced observer of business behavior and highly unlikely to have been in doubt about the nature of the Oklahoma law. In any case, the opticians made the point starkly clear:

The undisputed record evidence clearly establishes that optometrists in Oklahoma and elsewhere are in direct competition with opticians in the sale of eyeglasses, frames and lenses, and because of their economic dependence upon the sale of those articles, the merchandising interests of the optometrist play a dominant part in the establishment of their professional objectives and activities. . . . The direct effect of [the law] is to transfer from the optician to the optometrist a large and profitable portion of the former's business. [It] contains no regulations or standards for opticians but rather is a discriminatory statute that arbitrarily takes from the optician a major portion of his lawful business. . . . all the evidence introduced demonstrates that the fitting, adjusting and duplication of eyeglasses by opticians is not an "evil" and that the prohibitions contained in [the law] have no real and substantial relationship to the announced purpose of the act—the protection of the public's health and welfare.

Brief for Respondents-Appellants at 20, 24, 51, *Williamson v. Lee Optical*, 348 U.S. 483 (1955) (Nos. 184 & 185).

sure, the present law does not [actually require this,] . . . [b]ut the law need not be in every respect logically consistent with its aims to be constitutional.<sup>116</sup>

The discussion is, intellectually, entirely in the subjunctive, a matter of theoretical possibilities with no relationship to the opticians' factual claim that the law was simply a means of transferring much of the opticians' business to their competitors.<sup>117</sup>

Justice Douglas's statement of why this exercise in legal fantasy was sufficient to decide the case was very brief: "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."<sup>118</sup> And with that exercise in non-explanation, the Court, almost certainly knowing what it was doing, allowed one side in an economic competition for profits to manipulate the competitive playing field through legislation, to the likely detriment of everyone in Oklahoma *except* the successful interest group.<sup>119</sup> As we know, however, the Court had a reason for its decision, one that had nothing to do with eyeglasses or interest groups: the Justices' desire to make unmistakably clear their repudiation of the vigorous protection of economic liberty through the Due Process and Equal Protection Clauses associated with *Lochner v. New York*.<sup>120</sup>

For veterans of the New Deal battle over judicial supremacy such as Justice Douglas, *Lochner* was the paradigm of a Court utterly forgetful of its duty to observe the limits on its own power and of the respect it

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116. *Williamson*, 348 U.S. at 487–88 (emphasis added) (rejecting the due process claim); *see also id.* at 489 (rejecting the equal protection claim on similarly hypothetical grounds).

117. *See* Brief for Respondents-Appellants at 52, *Williamson v. Lee Optical*, 348 U.S. 483 (1955) (Nos. 184 & 185) ("Rather, it is the law that deprives opticians of a substantial portion of their business, which deprived portion of the opticians' business is transferred to optometrists or else channeled into the hands of a few opticians who possess the favor of ophthalmologists.").

118. 348 U.S. at 488.

119. *See* Franchetti, *supra* note 113, at 489 ("[F]or optometrists nationwide, the case represented a significant early victory in the optical-industry battle. It confirmed that the activities of the profession's primary eyewear-sales competitors could be controlled by statute without violating the federal constitution."). As indicated in the text, before *Heller* it seemed likely that the last words in the parenthetical quotation should actually have read "without inference by courts on federal constitutional grounds."

120. 198 U.S. 45 (1905). *See, e.g.,* Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 559 n.326 (2004) ("[*Williamson's*] deferential posture grew explicitly out of the shadow of *Lochner*.").



owes the legislative function.<sup>121</sup> The New Deal cure for the disease of *Lochner* was to redraft, or redirect, constitutional doctrine so that courts would, at least in most circumstances, give legislatures the widest possible scope for their lawmaking decisions. As the Court put it, shortly after the 1937 shift, “Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.”<sup>122</sup> The extraordinarily deferential form of judicial review that the Court employed in *Williamson*, and that it adheres to in modern rational-basis cases such as *Beach Communications*,<sup>123</sup> springs out of this prophylactic or strategic intention. It is doctrine, crafted to prevent one constitutional actor, the judiciary itself, from violating however innocently the constitutional norms we collectively describe as the separation of powers. The Court replaced a paradigm of judicial overreaching with what Justice Thomas in *Beach Communications* termed “a paradigm of judicial restraint.”<sup>124</sup>

### 1. *The Doctrinal Gap in Williamson*

Where there is a doctrinal gap, judicial doctrine is, by definition, either overenforcing or underenforcing an actual constitutional norm for strategic reasons. In the context of *Williamson* there is, of course, no possibility that the Court is following a rule that is more stringent than the commands of the Due Process and Equal Protection Clauses. *Williamson*-style rational-basis review is virtually toothless.<sup>125</sup> As soon as one recalls the traditional, prophylactic justification for rational-basis scrutiny, it becomes obvious that there probably is a doctrinal gap between the Court’s deferential standard of review and the constitutional principle (usually due process or equal protection) the Court is enforcing. The justification of a need to respect the legislative function, after all, does not speak in terms of the substance of those principles.

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121. Whether this was entirely fair to the Justices associated with *Lochner* is beside the point for present purposes: I shall use “*Lochner*” and “the New Deal [Court]” to stand, conventionally and respectively, for the Court’s uneven protection of economic liberty prior to 1937 and its almost complete retreat from such protection beginning in that year.

122. *Carmichael v. S. Coal & Coke Co.*, 301 U.S. 495, 510 (1937).

123. *FCC v. Beach Commc’ns*, 508 U.S. 307 (1993); see *supra* text accompanying note 57.

124. *Id.* at 314 (quoting *Vance v. Bradley*, 440 U.S. 93, 97, 99 (1979)).

125. See, e.g., Sheldon Gelman, “*Life*” and “*Liberty*”: *Their Original Meaning, Historical Antecedents, and Current Significance in the Debate over Abortion Rights*, 78 MINN. L. REV. 585, 604 (1994) (describing *Williamson* as “employing a particularly toothless version of the rational basis test”).

Indeed, the constitutional commands that the Court's justification appears to have in view concern separation of powers and the negative implications of the federal judiciary's limitation to the exercise of the "judicial power" in specifically enumerated cases and controversies. By the Court's own reasoning, then, it would be in a sense coincidental if the self-restraint driven doctrine of deferential rational-basis scrutiny produced the same operational rule as the substantive requirements of due process and equal protection—and of course all the cases in which the Court does not employ rational-basis review in implementing those requirements make it seem very unlikely that there is such a coincidence.

The rational-basis test of *Williamson* is, as Dean Sager argued, most likely an example of judicial underenforcement. We should not read Justice Douglas's opinion, therefore, as concluding that the legislation under review—an unabashed exercise in rent-seeking without any public-regarding purpose, as the district court (the trier of fact) found it to be—actually treated similarly situated parties similarly, or restricted the opticians' liberty for some legitimate governmental purpose. *All* Justice Douglas, or the Court, actually announced was that under the judiciary's limited form of review, self-imposed out of respect for the legislature, the Court could not hold the statute unconstitutional. Justice Douglas's language suggested as much: "The prohibition of the Equal Protection Clause goes no further than the invidious discrimination. We cannot say that that point has been reached here. . . . [f]or all this record shows."<sup>126</sup> On this reading of his language, Justice Douglas deliberately offered any judgment about whether the statute was unconstitutional *in principle*, apart from judicial deference. It would be possible in theory to conclude that the consequence of the Court's strategic underenforcement is simply to leave the constitutional question in principle unanswered. But another rhetorical strand in the Court's explanation for its deference to the legislature implies that Dean Sager is right, and judicial underenforcement triggers the legal obligation on the part of non-judicial government officials "to obey an underenforced constitutional norm . . . beyond its interpretation by the federal judiciary to the full dimensions of the concept which the norm embodies."<sup>127</sup> For the New Deal Court, Justice Holmes was an iconic figure, and the Justices of that era were well aware that in addition to his general attitude of deference, Holmes had written in *Missouri, Kansas & Texas Railway Co. v. May*<sup>128</sup>

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126. *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955) (emphasis added).

127. Sager, *supra* note 104, at 1227.

128. 194 U.S. 267 (1904).

that “it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.”<sup>129</sup> As Sager himself noted in his article, the *May* passage indicates that Holmes was an adherent to Sager’s thesis *avant la lettre*: “Holmes, I think . . . meant quite literally that the legislatures were to be regarded as guardians of the liberties of the people—including and especially those enshrined in the Constitution—above the power of the Supreme Court to enforce those same liberties.”<sup>130</sup>

It is plausible that Douglas and his colleagues in *Williamson* explicitly thought that the gap between a less restrictive rational-basis doctrine and a more restrictive constitutional command was supposed to be filled by the legislature’s own conscientious respect for the command.<sup>131</sup> The Court expressly stated this expectation in a different doctrinal context at the very dawn of its New Deal era. Discussing the Constitution’s limitation of Congress’s spending power to expenditures for the general welfare, Justice Cardozo wrote in 1937:

The line must still be drawn between one welfare and another, between particular and general. Where this shall be placed cannot be known through a formula in advance of the event. There is a middle ground or certainly a penumbra in which discretion is at large. The discretion, however, is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment. This is now familiar law.<sup>132</sup>

The norm that federal spending must serve the general welfare (or common defense) is a constitutional command; the judgment of which Cardozo wrote is a constitutional judgment as to the purpose and effect of congressional expenditures and Congress’s discretion in enacting spending legislation included the duty and authority to exercise its own judgment on the fit between a spending bill and the constitutional norm. One of the primary “constitutional restraints” insuring that Congress will observe this norm, then—Justice Stone wrote in a slightly earlier case, is

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129. *Id.* at 270. Justice Douglas quoted the Holmes passage in an opinion in *United States v. Enmon*, 410 U.S. 396, 413 (1973) (Douglas, J., dissenting).

130. Sager, *supra* note 104, at 1227 n.48.

131. The relevant passage from Justice Holmes’s opinion in *May* appears in several opinions written before *Williamson* by Justices who shared the New Deal rejection of *Lochner*. See *United States v. Lovett*, 328 U.S. 303, 319 (1946) (Frankfurter, J., concurring); *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 131 (1940) (majority opinion of Black, J.); *United States v. Butler*, 297 U.S. 1, 87 (1936) (Stone, J., joined by Brandeis & Cardozo, JJ., dissenting).

132. *Helvering v. Davis*, 301 U.S. 619, 640 (1937).

“the conscience and patriotism of Congress and the Executive”<sup>133</sup> because judicial review of spending legislation ought to be limited to what Cardozo called the “display of arbitrary power.” Dean Sager’s views on the political branches’ responsibility were orthodox for the New Deal Court.

2. *The Implications of Nonjudicial Constitutional Enforcement Under the Facts of Williamson*

Justice Douglas’s opinion in *Williamson* invites speculation about how legislative implementation of an underenforced constitutional norm might work. Imagine a state legislature debating whether to enact a law materially the same as that upheld in *Williamson*, but in circumstances where Holmes’s dictum about legislatures being ultimate guardians of the liberties of the people was a live part of legislative discussion. One potential topic for deliberation would be the constitutionality under the Equal Protection Clause of dividing businesses factually able to fit lenses into new frames into ophthalmologists and optometrists (who could do so without referring the customer to a different business for a required prescription) and opticians (who could not). *Williamson* would make it clear to the legislators that the courts would not invalidate legislation making such a distinction, but that would not be the end of the constitutional discussion. Precisely because the judiciary would defer to the legislature’s decision, conscientious legislators would find it necessary to determine whether the distinction violates equal protection for themselves, as a matter of their own constitutional judgment and not as a prediction or anticipation of what would happen in court.<sup>134</sup>

Looking to the U.S. Supreme Court’s case law not to predict the judiciary’s actions but to discern the actual constitutional norm, a representative might reason that the underlying norm applicable to his or her lawmaking actions in principle is something like the following: “[T]he classification ‘must rest upon some ground of difference having a

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133. *Butler*, 297 U.S. at 87 (Stone, J., dissenting). Justices Brandeis and Cardozo joined the dissent, which went on vigorously to reject “any assumption that the responsibility for the preservation of our institutions is the exclusive concern of any one of the three branches of government . . .” *Id.* at 87–88.

134. Sager, *supra* note 104, at 1227 (“This obligation to obey constitutional norms at their unenforced margins requires governmental officials to fashion their own conceptions of these norms and measure their conduct by reference to these conceptions. Public officials cannot consider themselves free to act at what they perceive or ought to perceive to be peril to constitutional norms merely because the federal judiciary is unable to enforce these norms at their margins. At a minimum, the obligation of public officials in this context, as in any other, is one of ‘best efforts’ to avoid unconstitutional conduct.”)

fair and substantial relation to the object of the legislation,” or (put differently) must “rest[] upon some reasonable consideration of difference or policy . . . .”<sup>135</sup> Given factual evidence of the sort presented to the *Williamson* district court, legislators might ask questions about the public benefit served by the law, and the fairness and policy of excluding opticians from performing services they can provide without obvious public detriment.

We need not indulge an unrealistic romanticism about politicians to see potential practical value from such questions in addition to the intrinsic rule of law value in public officials acting in accordance with their legal duties.<sup>136</sup> In some situations, constitutional doubts might in fact lead to the defeat of egregious rent-seeking and other substantively indefensible bills; in others constitutional opposition to a proposed law might lead to improvements in the legislation, or create a legislative record making popular repudiation of or judicial intervention against improvident or special-interest laws more likely.

The Constitution does not, of course, guarantee that legislatures will make no mistakes or even that they will avoid giving in to political pressure. At the same time, as our tradition has interpreted equal protection and due process for a very long time, it does guarantee that there are significant limits to the extent to which classifications can serve selfish concerns or liberty can be impaired without some discernible benefit to the common good. If, as Justice Holmes wrote, “legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts,”<sup>137</sup> the consideration of constitutional issues concerning those liberties is an intrinsic part of the legislative function, and Dean Sager’s thesis, that the legislature has a special responsibility where the federal courts cannot guard constitutional liberty, seems very persuasive.

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135. See *Allied Stores v. Bowers*, 358 U.S. 522, 527 (1959) (citations omitted) (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920); *Brown-Forman Co. v. Kentucky*, 217 U.S. 563, 573 (1910)). But see *U.S.R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 174–77 (1980) (discussing variations in the Court’s formulation of the rational-basis test).

136. The Court has observed that an inquiry into the relation between the legislature’s goals and its use of classifications is of value to the legislative process. See *Romer v. Evans*, 517 U.S. 620, 632 (1996) (“The search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature, which is entitled to know what sorts of laws it can pass . . . .”).

137. *Mo., Kan. & Tex. Ry. Co. v. May*, 194 U.S. 267, 270 (1904).

V. *HELLER*'S FOOTNOTE 27 REPRESENTS A REJECTION OF  
THE STRATEGIC UNDERSTANDING OF RATIONAL-BASIS  
SCRUTINY

Footnote 27 in *Heller* overturns the traditional understanding of rational-basis review as described above. According to Justice Scalia, the rational-basis test is not a strategic doctrine, designed to avoid judicial interference with the “rightful independence and . . . ability to function”<sup>138</sup> of “the legislative branch,”<sup>139</sup> as the Court has so often indicated.<sup>140</sup> At least with respect to equal protection (and there is no reason to doubt that he meant to include due process as well),<sup>141</sup> the footnote indicates that rational-basis inquiry does not underenforce the Constitution’s actual commands, as Dean Sager thought. Indeed, the rational-basis test is not really judicially crafted doctrine at all, but a straightforward restatement of the constitutional norms at issue: “rational-basis scrutiny is a mode of analysis we have used when evaluating laws under constitutional commands that are themselves prohibitions on irrational laws. In those cases, ‘rational basis’ is not just the standard of scrutiny, but the very substance of the constitutional guarantee.”<sup>142</sup> There is no doctrinal gap: the Court enforces the entirety of the constitutional guarantee, which itself extends only to prohibiting “irrational laws.”

We are now in a position to see why footnote 27 is potentially so important. First, the footnote annuls all the oft-repeated language, from the *May* case in 1903 to *Beach Communications* in 1993, describing rational basis as grounded in judicial respect for the legislature and legislative judgment. By deferring to any rational ground for the legislature’s decision, rather than deciding itself whether the classification or invasion of liberty was reasonable, the judiciary ensures that it does not tread on legislative turf. Taken at face value, footnote 27 flatly rejects this familiar argument.

First, according to the footnote, the Court’s application of rational basis is not—or at any rate should not be—a strategic act of deference to

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138. *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993) (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 365 (1973)).

139. *Id.*

140. *See Lehnhausen*, 410 U.S. at 365; *Carmichael v. S. Coal & Coke Co.*, 301 U.S. 495, 510 (1937).

141. The Court sometimes uses the language of rational basis in other areas of constitutional law. *See, e.g., Gonzales v. Raich*, 545 U.S. 1, 22 (2005) (Commerce Clause). It is clear that Justice Scalia did not have those uses of the terminology in mind in writing footnote 27.

142. *Dist. of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008) (citation omitted).

a legislature. According to footnote 27, the Court upholds laws with flimsy or ex post facto rationales, with glaring inadequacies in the connection between asserted goals and actual means, even with as undisguised an unsavory motive as the district court thought apparent in *Williamson*.<sup>143</sup> This suggests that the sharp limitations on rational-basis scrutiny are not because the Court needs to leave a broad scope for the exercise of legislative discretion, or out of the Court's respect for the superior fact-finding or policy-making abilities or responsibilities of the legislature. The judicial decision is directly mandated by the Constitution because the Constitution itself permits such laws. From the perspective announced by footnote 27, it may be true that the consequence of the Court enforcing all that the Constitution requires and nothing more is to leave room for legislative discretion and all the rest. But that consequence is not the reason, or even *a* reason, for the Court's flaccid level of scrutiny. The explanation of the latter is that rational basis is "the very substance of the constitutional guarantee," and that as a result there is nothing else for the Court to enforce. Apparent statements to the contrary from Justice Holmes to Justice Thomas were all mistakes.

Second, the footnote is enormously suggestive with respect to existing rational-basis precedents. The reader will recall the role that the existence of a doctrinal gap plays in constitutional stare decisis: a doctrine that is understood, explicitly or not, to incorporate a strategic element is in a sense more vulnerable. A Justice can repudiate his or her adherence to it without admitting to a serious error in the interpretation of the Constitution itself. Justice Scalia's abandonment of the congruence and proportionality test for congressional legislation under the Fourteenth Amendment is a good example.<sup>144</sup>

On the other hand, if there is little or no distance between the test the Court applies and the actual command of the Constitution, precedent applying the test is itself more straightforwardly right or wrong, a correct application of the Constitution or a flat misconstruction of it. According to footnote 27, the latter is the case with rational-basis precedents: those cases are direct applications of "the very substance of the constitutional guarantee" prohibiting "irrational laws." There can be in principle no laws that the Court upheld—or at least that it should have upheld—that are "irrational" in the constitutional sense—whatever Justice Scalia means by "irrational," an issue to which we shall eventually turn. Unless

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143. See *supra* Part IV.C.

144. See *supra* notes 78–83 and accompanying text.

the Court decided *Williamson v. Lee Optical* incorrectly, the law there, on the facts as found by the district court, satisfies the Constitution's guarantees concerning equal protection and due process. Conversely, cases in which the Court invalidated a law using rational-basis scrutiny were mistakes if the laws in question were not, constitutionally, irrational.

Footnote 27 could be, therefore, a powerful tool for sorting out the Court's rational-basis case law, a body of decisions that, on any fair reckoning, is in a fair state of disarray.<sup>145</sup> If the Court is to accept any form of stare decisis, the mere fact that a later Justice thinks a decision wrong in principle does not require departure from it, but identifying error in the basis for the decision is cause for reconsideration of the precedential status of a decision. There is one set of rational-basis precedents where footnote 27 suggests reconsideration is in order, even without delving into the precise meaning of "irrational": the small and motley set of cases in which the Court invalidated a law not because the law was literally without reason, but because the Court held the government's reasons to be bad ones.<sup>146</sup> These decisions are opaque because it is hard to explain why the Court looks behind the ex post facto rationalizations it usually swallows.

On an underenforcement understanding of rational-basis scrutiny, however, the decisions make perfect sense in substance. It is always the law of the Constitution that bad purposes render a classification (or a restriction on liberty) unconstitutional: constitutional rationality requires not only that the official action make sense as a means toward some governmental end but that the end itself be legitimate, which is a normative judgment.<sup>147</sup> As the Court observed in an opinion joined by

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145. See, e.g., *Cent. State Univ. v. Am. Assoc. of Univ. Profs.*, 526 U.S. 124, 132–33 & n.3 (1999) (Stevens, J., dissenting) (discussing implications of fact that "[c]ases applying the rational-basis test have described that standard in various ways" that are inconsistent).

146. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 577–78 (2003) (state interest in enforcing majority's moral views insufficient); *Romer v. Evans*, 517 U.S. 620, 634–35 (1996); *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985) (as-applied decision); *Williams v. Vermont*, 472 U.S. 14, 22–24 (1985); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 882 (1985); *Plyler v. Doe*, 457 U.S. 202, 227–30 (1982); *Dep't of Agric. v. Moreno*, 413 U.S. 528, 533–35 (1973); *Levy v. Louisiana*, 391 U.S. 68, 71–72 (1968). This list is neither exhaustive nor indisputable: the Court is not always clear what standard it is applying.

147. See, e.g., *Bd. of Trs. v. Garrett*, 531 U.S. 356, 367 (2001) (noting as a statement of an "unremarkable and widely acknowledged tenet of this Court's equal protection jurisprudence" an earlier statement that "negative attitudes, or fear, *unsubstantiated by factors which are properly cognizable* . . . are not permissible bases" for governmental discrimination (quoting *Cleburne*, 473 U.S. at 448)); *Romer*, 517 U.S. at 635 ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." (quoting *Moreno*, 413 U.S.



Justice Scalia, under “the usual rational-basis test: if a statute is not rationally related to any legitimate governmental objective, it cannot be saved from constitutional challenge by a defense that relates it to an *illegitimate* governmental interest.”<sup>148</sup>

Most of the time, the value of judicial deference in preventing judicial overreaching makes it inappropriate for the courts to engage in the sort of intrusive review of legislative action necessary to catch legislation with bad purposes. But when a court, as it were, stumbles across a bad legislative purpose, no strategic purpose would be served in ignoring the fact, and it becomes the court’s constitutional duty to invalidate the law. The mistake the district court judges made in *Williamson* was that the scrutiny they applied to the handiwork of the Oklahoma Legislature was insufficiently respectful of the latter’s constitutional dignity and role. On the constitutional merits, the district court may have been entirely correct. In contrast, from the perspective advanced by footnote 27, the district court judges in *Williamson* were simply wrong in principle if the Oklahoma law was not “irrational” constitutionally—or they were right and the U.S. Supreme Court made a mistake in reversing them. The bad-purpose cases in which the High Court has invalidated official decisions on that ground were right only if those actions were irrational in a sense that the many laws and other actions the Court has upheld were not. Justice Scalia’s underlying logic in footnote 27 leads to the conclusion that the bad-purpose cases were all mistakes, because the category of

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at 534)); *Lyng v. Int’l Union, UAW*, 485 U.S. 360, 370 n.8 (1988) (quoting *Moreno*, 413 U.S. at 533–34); *Cleburne*, 473 U.S. at 446–47 (“[S]ome objectives—such as ‘a bare . . . desire to harm a politically unpopular group,’—are not legitimate state interests.” (citation omitted) (quoting *Moreno*, 413 U.S. at 534)); *N.Y.C. Transit Auth. v. Beazer*, 440 U.S. 568, 593 n.40 (1979) (noting “classifications drawn ‘with an evil eye and an unequal hand’ or motivated by ‘a feeling of antipathy’ against, a specific group” violate equal protection (citations omitted) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886)); *Weinberger v. Salfi*, 422 U.S. 749, 772 (1975) (stating that “of course Congress may not invidiously discriminate . . . on the basis of a ‘bare congressional desire to harm a politically unpopular group’” but must use “criteria” that have a rational relation to a “legitimate legislative goal” (quoting *Moreno*, 413 U.S. at 534)); *Moreno*, 413 U.S. at 534. In *Beazer*, 440 U.S. at 593 n.40, the Court traced the requirement of a legitimate governmental purpose back to *Barbier v. Connolly*, 113 U.S. 27 (1884). See *Barbier*, 113 U.S. at 32 (holding that equal protection prohibits “[c]lass legislation, discriminating against some and favoring others,” but permits “legislation which [] carr[ies] out a public purpose”).

148. *Lyng*, 485 U.S. at 370 n.8. My point is not to criticize Justice Scalia for inconsistency (*Lyng* was long ago and decided early in his time on the Court), but to underline the ordinary and (one would have thought) uncontroversial nature of the proposition that constitutional rationality, which requires at least the hypothetical presence of a “legitimate” governmental interest or purpose, has a normative component. The Court has not treated public rationality as limited to a mere logical connection between means and ends.

“irrational laws” does not encompass them. In any event, without further explanation they are even more anomalous than before.

Third, footnote 27 entirely collapses Dean Sager’s underenforcement thesis with respect to rational-basis scrutiny. In doing so, it eviscerates the corollary he drew of a constitutional duty on the part of other governmental officials to implement constitutional norms that judicial doctrine left underenforced for strategic reasons. It would be quite wrong for a legislator to oppose a *Williamson*-like bill on the ground that the legislator thought it violated equal protection, at least along the lines outlined earlier, or for that matter for a governor to veto the bill because the governor similarly thought it unconstitutional. If the bill would pass judicial rational-basis scrutiny, then there is no federal constitutional argument that it is nevertheless a violation of equal protection, because the whole substance of equal protection is a prohibition on irrational laws, and irrational laws are those that fail rational-basis examination. In the world of footnote 27, there is no normative gap between constitutional command and judicial doctrine that is to be filled, or even can be filled, by the conscientious application of constitutional norms by non-judicial officials. Footnote 27 leaves the domain of politics wider, in the sense that under it fewer possible laws would be unconstitutional in principle. But it does so by making the domain of politics much narrower in another way, stripped of any special role in constitutional implementation.

Implicit in footnote 27 is a vision of the relationship between politics and the Constitution that we have already considered: the Constitution as analogue to the Internal Revenue Code, with the political branches of government in the position of taxpayers “obligated” to obey the Constitution only in the sense of being subject to external sanctions for violations of the rules that the external authority (the courts in the case of the Constitution) enforces.<sup>149</sup> For Justice Scalia, presumably, this is the arrangement that the Constitution itself ordains and that American constitutional practice has traditionally respected. This arrangement is, however, demonstrably in error about the tradition. Whether he is nevertheless right about what the Constitution ordains when it is properly interpreted depends on other considerations. As the Court noted in *City of Boerne*, Madison argued in the First Congress that “it is incontrovertibly of as much importance to this branch of the Government as to any other, that the constitution should be preserved

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149. See *supra* notes 89–91 and accompanying text.

entire. It is our duty.”<sup>150</sup> From Madison’s perspective, which is surely correct, the implementation of the Constitution is “the province and duty” of the political branches just as much as it is that of the judiciary, even if they carry out that responsibility through different means and, generally, with respect for the finality of judicial decisions. By drawing a sharp line between the domain of political freedom and the domain of constitutional principle, footnote 27 undermines Madison’s principle.<sup>151</sup>

There is a fourth way in which footnote 27 is potentially far-reaching, although it is not as clear as with the first three points that this implication is fairly attributable to the footnote. As noted earlier, Justice Scalia’s dissent in *Dickerson* appeared to reject altogether the legitimacy of judge-made doctrine that imposes stricter limitations on political action than the Constitution’s norms necessarily require, “in the sense” (as Chief Justice Rehnquist wrote) “that nothing else will suffice to satisfy constitutional requirements.”<sup>152</sup> Footnote 27 does not address strategic, overenforcing or prophylactic judicial doctrine, of course, and Justice Scalia has written or joined opinions in cases besides *Dickerson* that appear to take a somewhat less draconian position on overenforcing doctrines. Nevertheless, putting the *Dickerson* dissent (no overenforcing doctrine) together with footnote 27 (rational basis, the usual paradigm of an underenforcing doctrine, is nonetheless not an underenforcing doctrine) suggests a consistent, if intellectually radical, perspective: all constitutional doctrine is, in principle, illegitimate.

On its face, judicial overenforcement, which narrows political action more than the Constitution does per se, is quite different from judicial underenforcement, which expands the range of possible political

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150. See *City of Boerne v. Flores*, 521 U.S. 521, 535 (1997) (citing 1 ANNALS OF CONG. 500 (1789)); *supra* text accompanying note 98.

151. I should note an ostensible exception. Justice Scalia appears to think, rightly I believe, that at least some of the time, a decision that an issue poses a non-justiciable political question means not that there is no legal rule applicable, but that the Constitution leaves the implementation of the rule to a non-judicial actor. See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004) (plurality opinion of Scalia, J.) (“Sometimes, however, the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights.”); *id.* at 292 (“The issue we have discussed is not whether severe partisan gerrymanders violate the Constitution, but whether it is for the courts to say when a violation has occurred, and to design a remedy.”). This exception is partial as well as rare: application of the political question doctrine means only that some non-judicial decisionmaker has some small area of responsibility for making law-like decisions in addition to its usual, political role.

152. Compare *Dickerson v. United States*, 530 U.S. 428, 442 (2000) (majority opinion of Rehnquist, C.J.), with *id.* at 461 (Scalia, J., dissenting) (rejecting what he described as “the power of the Supreme Court to write a prophylactic, extraconstitutional Constitution, binding on Congress and the States”).

decisions. Both however are strategic in nature and create a doctrinal gap between judicial decision and constitutional command. Furthermore, when adopted deliberately, both over- and underenforcement depend on an understanding of constitutional law that is inconsistent with the existence of a sharp-edged distinction between constitutional and political decisions. Underenforcement presupposes political-branch constitutional implementation while overenforcement assumes the legitimacy of judicial decisions that involve strategic considerations that are, at least in a broad sense, political in nature. Justice Scalia's extra-judicial writings strongly suggest that that he views all judicial doctrine in constitutional matters as illegitimate. The Constitution, he appears to think, consists of rules, constitutional law should implement those rules, no more and no less, and all the rest of governmental action is subject to what we might call "aconstitutional" political decisionmaking—political choice unconstrained by constitutional considerations outside the judicially enforced rules.<sup>153</sup> This view is, perhaps, a theoretically defensible position, and as a verbal matter at least, it has an illustrious pedigree.<sup>154</sup>

But it clearly does not represent the mainstream of American constitutional thought or practice, which is resolutely doctrinal.<sup>155</sup> There is nothing surprising about finding Justice Scalia taking a radical stance toward some feature of contemporary constitutional law that he thinks

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153. See, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION 37–41 (1997); Antonin Scalia, *The Rule of Law As a Law of Rules*, 56 U. CHI. L. REV. 1175, 1185 (1989).

154. Thomas Jefferson sometimes made statements that sound as if he was an adherent to a form of constitutional literalism. See, for example, his famous letter to Wilson C. Nicholas: "Our peculiar security is in possession of a written Constitution. Let us not make it a blank paper by construction." Letter from Thomas Jefferson to Wilson Cary Nicholas (Sept. 7, 1803), in 8 *The Writings of Thomas Jefferson* 247 (Paul Leicester Ford ed., New York, G.P. Putnam's Sons 1897); see also H. Jefferson Powell, *The Principles of '98: An Essay in Historical Retrieval*, 80 VA. L. REV. 689 (1994) (discussing the role of textualism in Jeffersonian constitutionalism). In a more recent era, Justice Black's self-professed literalism comes immediately to mind.

155. See generally CHARLES FRIED, SAYING WHAT THE LAW IS (2004), which is an elegant account of and (in the main) apology for contemporary constitutional doctrine. Professor (and former Justice) Fried puts the inevitability of doctrine more strongly: "The Constitution's text must be mediated by doctrine before it can yield decision." *Id.* at 3. There may also be areas of justiciable constitutional controversy where the underlying norm can be implemented rather directly. See, e.g., DAVID L. LANGE & H. JEFFERSON POWELL, NO LAW: INTELLECTUAL PROPERTY IN THE IMAGE OF AN ABSOLUTE FIRST AMENDMENT 300–01 (2009) (defending an absolutist approach to free speech protection under the First Amendment). As a general matter, however, I think that anti-doctrinalism in the name of the constitutional text has been more a rhetorical trope (and a powerful one) for its most prominent proponents. See *id.* at 239–60 (reading Justice Black's First Amendment absolutism as based in fact on a structural vision of constitutional institutions rather than simply on the words of the provision); H. JEFFERSON POWELL, A COMMUNITY BUILT ON WORDS 11–21 (2003) (discussing an example of Jefferson going beyond the text in answering a constitutional question).

wayward,<sup>156</sup> but institutions tend to be conservative with respect to their practices. Whatever Justice Scalia may think, it does not follow that the rest of the Justices in the *Heller* majority intended to endorse a position that is, at most, only partially to be found in one of its footnotes, and that would mark a sea change from their existing practices. But nothing proves that they, or most of them, do not,<sup>157</sup> and in any event the language in U.S. Supreme Court opinions takes on a life of its own, with consequences that are not delimited by the intentions of those who write them or join them.<sup>158</sup>

If footnote 27 proves to advance any of these four implications, it will turn out to be highly significant. There is yet another aspect of the footnote, which is still more important, although at a more fundamental level. According to the footnote, when the Court uses rational-basis scrutiny in enforcing constitutional “guarantees”—in implementing equal protection and substantive due process, at the least—the form of the Court’s scrutiny is conceptually identical to the substance of the constitutional guarantee itself. Rational basis is the test when the constitutional command is a prohibition on irrationality in government action. In Justice Scalia’s view, only the irrational, as such, is the Constitution’s concern when the norms of equal protection and substantive due process are invoked, at least in the vast majority of cases where government treats someone differently than it does others, or

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156. Justice Scalia’s frequent invocation of tradition as a feature of constitutional thought, and perhaps the sense that he is, in the evening-news sense, a “conservative,” together tend to obscure the fact that he often takes intellectually radical positions on legal and constitutional issues. Patrick Brennan’s analysis of Justice Scalia’s overall constitutional approach, which Brennan calls “Scalia’s bid for radical reform,” is especially insightful. See Patrick McKinley Brennan, *Locating Authority in Law, and Avoiding the Authoritarianism of “Textualism,”* 83 NOTRE DAME L. REV. 761, 797 (2008). The impulse to radical reform is a recurrent and, overall, beneficial element in American legal change and to observe that someone is taking a radical position in (or on) the law is not thereby to criticize him or her but only to identify the relationship of his or her position to those generally accepted, at the time or historically.

157. Justice Kennedy is the only Justice who joined the opinion of the Court in *Dickerson* who was also on the Court and in the majority in *Heller*. On the basis of *Dickerson* alone, it is hard to see how he could subscribe to the anti-doctrine approach to constitutional law that I believe Justice Scalia implied in footnote 27. As Justice Kennedy’s opinions in *City of Boerne* and *Croson* show, he does not oppose the overt consideration of strategic factors in shaping doctrine. See *City of Boerne v. Flores*, 521 U.S. 507 (1997); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 519 (1989) (Kennedy, J., concurring in part and in the judgment); *supra* text accompanying notes 51–52.

158. As Professor Schauer pointed out years ago, the language of the Court’s opinions has an authoritative life of its own. See Frederick Schauer, *Opinions as Rules*, 53 U. CHI. L. REV. 682, 684 (1986) (“[T]he words of an opinion take on a canonical role not unlike that played by the words in a statute . . .”).

restricts someone's liberty.<sup>159</sup> This is a very different explanation of the test than the strategic rationale that the Court has ordinarily invoked since 1937.<sup>160</sup> If footnote 27 is adopted more broadly, courts would ask only whether a law or other governmental action is sheerly irrational as a logical matter, because under the footnote it is only sheer illogic that violates the Constitution, and rational-basis scrutiny is not a means of according deference to a political actor who may properly have an independent view of what makes sense in terms of classification or regulation. Footnote 27 invites the reader to wonder what exactly is the concept of rationality or irrationality that the footnote identifies as "the very substance" of two of the Constitution's central commands. Fortunately, the footnote, although brief, gives a big clue as to what Justice Scalia means. We now turn to deciphering what he is telling us.

#### VI. FOOTNOTE 27 EMBODIES CHIEF JUSTICE ROBERTS'S UNDERSTANDING OF THE CONSTITUTION'S REQUIREMENT OF RATIONALITY

Ambiguity is a potent source of confusion in constitutional law, and the U.S. Supreme Court's references to the irrational and its opposite often leave the reader uncertain of the Court's exact meaning. In the case of footnote 27, however, Justice Scalia provides a direct and extremely useful clue to his view: a citation to an opinion of the Court written by Chief Justice Roberts, *Engquist v. Oregon Department of Agriculture*. In *Engquist*, the Chief Justice provided an unusually clear explanation of how he understood the concept of rationality in equal protection analysis. Footnote 27's citation appears to incorporate that explanation in the footnote's assertion about the meaning of constitutional irrationality. Ostensibly, that explanation is the understanding footnote 27 is meant to incorporate.

##### A. *Engquist Is a Paradigm for the "Irrational"*

Here, again, is the relevant part of footnote 27, with a citation restored:

But rational-basis scrutiny is a mode of analysis we have used when evaluating laws under constitutional commands that are

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159. Again, rational-basis scrutiny is the default test under both rubrics. Justice Scalia is, if anything, in favor of expanding the range of circumstances in which the Court applies rational basis rather than some other form of heightened scrutiny.

160. *See supra* Part IV.C.

themselves prohibitions on irrational laws. *See, e.g., Engquist v. Oregon Dept. of Agriculture*, 553 U.S. —, —, 128 S. Ct. 2146, 2153–2154 (2008). In those cases, “rational basis” is not just the standard of scrutiny, but the very substance of the constitutional guarantee.<sup>161</sup>

*Engquist*, which the Court decided seventeen days before *Heller*, is one of “those cases” that illustrate the “very substance of the constitutional guarantee.” It is, consequently, a key to footnote 27’s interpretation of the Constitution’s ordinary or default norms with respect to substantive due process and equal protection.

*Engquist* was brought by a former state government employee who claimed that her discharge was unlawful for various reasons, among them an allegation that she was fired for “arbitrary, vindictive, and malicious reasons” (essentially personal animus), quite apart from animus toward her sex, race, and national origin, which she also alleged.<sup>162</sup> This allegation, *Engquist* argued, stated an equal protection class-of-one claim.<sup>163</sup> The district court agreed, and she won a jury award based in part on the allegation, but the court of appeals reversed, holding that the class-of-one theory of equal protection liability does not apply to public employers.<sup>164</sup> The theory, which the Court recognized as cognizable in an earlier decision, *Village of Willowbrook v. Olech*,<sup>165</sup> identifies an equal protection problem in situations where government singles out an individual for arbitrary treatment not because of his membership in an identifiable class such as race or sex, but on his own, as the unique object of official disfavor.<sup>166</sup> Relying on cases stressing the government’s special role as an employer, the Ninth Circuit concluded that the “class-of-one theory” was inapplicable in that context.<sup>167</sup> Other federal courts of appeals had sustained class-of-one claims in cases arising out of public employment, and the U.S. Supreme Court granted certiorari to resolve the split among the circuits.<sup>168</sup>

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161. *Dist. of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008).

162. *Engquist v. Or. Dep’t of Agric.*, 553 U.S. 591, 595 (2008) (quoting *Engquist’s* complaint).

163. *Id.*

164. *See Engquist v. Or. Dep’t of Agric.*, 478 F.3d 985, 996 (9th Cir. 2007).

165. 528 U.S. 562 (2000) (per curiam).

166. *See, e.g., Engquist*, 553 U.S. at 602 (“[W]hen it appears that an individual is being singled out by the government, the specter of arbitrary classification is fairly raised, and the Equal Protection Clause requires a ‘rational basis for the difference in treatment.’” (quoting *Olech*, 528 U.S. at 564)).

167. *Engquist*, 478 F.3d at 994–96.

168. *See, e.g., Hill v. Borough of Kutztown*, 455 F.3d 225, 239 (3d Cir. 2006); *Whiting v. Univ. of S. Miss.*, 451 F.3d 339, 348–50 (5th Cir. 2006); *Scarborough v. Morgan Cnty. Bd. of Educ.*, 470

The high Court affirmed the decision below, holding that the class-of-one theory should not be allowed in challenges to governmental decisions involving public employees.<sup>169</sup> Chief Justice Roberts, writing for the six-Justice majority, identified a two-part reason for that conclusion: one, the Court's "traditional view of the core concern of the Equal Protection Clause as a shield against arbitrary classifications" and, two, the "unique considerations applicable when the government acts as employer as opposed to sovereign."<sup>170</sup> By "traditional view," Chief Justice Roberts meant that equal protection claims usually arise when government "create[s] discrete and objectively identifiable classes" as the basis for its discrimination.<sup>171</sup> In contrast, the use of *class*-based decisionmaking to subject *individuals* to discriminatory treatment poses the danger of arbitrary distinction between similarly situated individuals—what Chief Justice Roberts calls "the specter of arbitrary classification."<sup>172</sup> In "traditional" analytical terms, therefore, a "*class* of one" is a figure of speech, but Chief Justice Roberts concluded that the class-of-one theory that *Olech* accepted was "an application of" traditional principle rather than "a departure from" it, because in *Olech*, and the cases on which *Olech* relied, there was "a clear standard [for the government action] against which departures, even for a single plaintiff, could be readily assessed."<sup>173</sup>

In contrast, in the context of government employment, the Chief Justice reasoned, there is no objective standard by which to determine if the government has acted arbitrarily, "for employment decisions are quite often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify."<sup>174</sup> The Chief Justice continued:

To treat employees differently is not to classify them in a way that raises equal protection concerns. Rather, it is simply to exercise the broad discretion that typically characterizes the employer-employee relationship. A challenge that one has been

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F.3d 250, 260–61 (6th Cir. 2006); Neilson v. D'Angelis, 409 F.3d 100, 104 (2d Cir. 2005); Levenstein v. Salafsky, 414 F.3d 767, 775–76 (7th Cir. 2005); Campagna v. Mass. Dep't of Envtl. Prot., 334 F.3d 150, 156 (1st Cir. 2003).

169. *Engquist*, 553 U.S. at 609.

170. *Id.* at 598.

171. *Id.* at 601 (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 60 (1973) (Stewart, J., concurring)).

172. *Id.* at 602.

173. *Id.*

174. *Id.* at 604.



treated individually in this context, instead of like everyone else, is a challenge to the underlying nature of the government action.<sup>175</sup>

In other words, subjective and individualized decisions, which Chief Justice Roberts identified as within the exercise of broad discretion, simply cannot be cabined even by a requirement that they be rational. For this reason, the class-of-one theory is “a poor fit in the public employment context,” and the Court agreed with the Ninth Circuit that equal protection claims such as *Engquist*’s are not cognizable.<sup>176</sup> “In such situations, allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise.”<sup>177</sup>

It is easy to imagine reading the Court’s holding in *Engquist* as a strategic decision, intended to keep the judiciary out of an area in which it would be extremely difficult for courts to vindicate the constitutional norm without undue interference in the functioning of the political branches. Without a “clear standard” to apply to personnel decisions, courts would find themselves simply second-guessing the executive or administrative officials who made the decisions on a discretionary basis in the first place, thereby “undermin[ing] the very discretion that such state officials are entrusted to exercise.”<sup>178</sup> The point of *Engquist*, on this reading, would not be that government is constitutionally free to make employment decisions based on whim or animus toward an individual employee, but rather that given the difficulty of ascertaining or even articulating the basis for many such decisions, it is preferable for the courts to abstain. Such deliberate judicial underenforcement would leave implementation of the norm to the political branches, not decree that what would be an illegitimate basis for governmental action in any other circumstance is constitutionally acceptable in government personnel decisions.

Footnote 27 of *Heller*, however, clearly rejects a strategic or doctrinal interpretation of *Engquist*. Rather, Justice Scalia’s view of *Engquist* in footnote 27 is also the more natural reading of Chief Justice Roberts’s opinion standing on its own.<sup>179</sup> According to footnote 27, *Engquist*

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175. *Id.* at 605.

176. *Id.*

177. *Id.* at 603. It is worth noting that the Court expressly reaffirmed the continuing viability of class-based claims about government employment decisions. *Id.* at 605.

178. *Id.* at 603.

179. There is language that could support a strategic understanding of *Engquist*, and without footnote 27 one might not be quite sure how to read the decision. See, for example, *id.* at 604, where

applied “the very substance of the equal protection guarantee”—a prohibition on “irrational laws”—in holding that the plaintiff’s allegations did not state an equal protection claim.<sup>180</sup> Those allegations, in other words, did not describe a constitutionally cognizable form of irrational government action. That is, on its face, a surprising proposition.<sup>181</sup> The plaintiff in *Engquist* alleged that “she was fired . . . for ‘arbitrary, vindictive and malicious reasons.’”<sup>182</sup> In class-based equal protection cases, if the government’s purpose is to harm the disfavored group for such reasons, its action is invalid under rational-basis scrutiny, because that test asks whether the classification in question serves a *legitimate* governmental purpose, not simply *some* purpose.<sup>183</sup>

Given the judicial willingness to entertain hypothetical and even implausible explanations for the government’s actions,<sup>184</sup> it is very difficult in a rational-basis case for a plaintiff to prevail on a claim of governmental purpose-to-harm, but that is a difficulty of proof and does not affect the underlying constitutional norm. Furthermore, in light of *Olech*’s recognition of the class-of-one theory, which *Engquist* did not question, it seems implausible to assert that it can be a legitimate governmental purpose to single out an individual for harm for “arbitrary, vindictive, and malicious reasons” peculiar to that individual. Such a

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the opinion’s reference to treating “*seemingly* similarly situated individuals differently in the employment context” at least allows the inference that the problem lies in the difficulty of judging decisions necessarily based in part on subjective or non-quantifiable factors (emphasis added). However, given the close temporal proximity between *Engquist* and *Heller*, and the fact that the two Justices joined one another’s opinions, there is no reason to think that Justice Scalia misunderstood the Chief Justice’s slightly earlier opinion.

180. *Dist. of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008).

181. It is, for constitutional purposes, immaterial in itself that *Engquist* involved an administrative decision rather than a law or other general rule. As the Chief Justice noted, administrators are just as surely governed by equal protection as legislators. 553 U.S. at 597. It is a familiar and very old feature of equal protection law, furthermore, that particular government decisions that violate the equal protection norm are unconstitutional even if the law under which they were taken is itself constitutional. *See, e.g., Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886). The Constitution demands that equal protection be afforded not only by the rule governing a public decision but by decision itself as well.

182. 553 U.S. at 595 (quoting Joint Appendix at 10, *Engquist v. Or. Dep’t of Agric.*, 553 U.S. 591 (2008) (No. 07-474)).

183. *See, e.g., U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534–35 (1973) (“[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest. As a result, ‘[a] purpose to discriminate against hippies cannot, in and of itself and without reference to [some independent] considerations in the public interest, justify [a government action].’” (second and third alterations and emphasis in original) (quoting *Moreno v. U.S. Dep’t of Agric.*, 345 F. Supp. 310, 314 n.11 (D.D.C. 1972))).

184. *See Williamson v. Lee Optical*, 348 U.S. 483, 487–88 (1955); *supra* Part IV.C.

purpose is indistinguishable from the invidious race- or gender-based animus that clearly is impermissible under equal protection.<sup>185</sup>

Despite all this, *Engquist* held that, in the area of government employment, equal protection does not prohibit decisions that would be constitutionally impermissible elsewhere: the constitutional “rule that people should be ‘treated alike, under like circumstances and conditions’ *is not violated* when one person is treated differently from others” in the context of “an individualized, subjective personnel decision.”<sup>186</sup> Such a decision cannot transgress the equal protection norm, even when it is, *ex hypothesi*, an “arbitrary or irrational” decision.<sup>187</sup> Equal protection simply has no application to such decisions including those situations in which they are made “in a seemingly arbitrary or irrational manner.”<sup>188</sup> The unavoidable implication is that the Constitution puts no equal protection constraint on the power of government to “treat[] an employee differently from others for a bad reason, or for no reason at all,” at least if it does not make use of a group-based classification in doing so.<sup>189</sup>

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185. The Court asserted in *Olech* that “the number of individuals in a class is immaterial for equal protection analysis.” *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 n.\* (2000). In order to avoid the risk that recognizing the class-of-one theory would convert many garden-variety disputes over governmental decisions into constitutional cases (an overtly strategic reason), Justice Breyer thought it crucial that the plaintiff in *Olech* had alleged that the governmental defendants had acted out of “‘vindictive [motives],’ ‘illegitimate animus,’ or ‘ill will.’” *Id.* at 566 (Breyer, J., concurring) (quoting *Olech v. Vill. of Willowbrook*, 160 F.3d 386, 388 (7th Cir. 1998)). The Court declined to include that as a requirement to state a class-of-one claim, but it clearly accepted the plaintiff’s allegation along those lines as adequately alleging that the government had “no rational basis for the difference in treatment.” *Olech*, 528 U.S. at 564.

186. 553 U.S. at 603, 605 (emphasis added) (quoting *Hayes v. Missouri*, 120 U.S. 68, 71–72 (1887)).

187. *Id.* at 605.

188. *Id.*

189. *Id.* at 606. The quoted language is the opinion’s summary of the at-will employment doctrine. The Chief Justice apparently assumed that a constitutional argument entailing modification of that common-law doctrine would be questionable on that ground alone. *See id.* (“The Constitution does not require repudiating that familiar doctrine.”). His assumption is puzzling. There is no plausible argument that the Bill of Rights or the Fourteenth Amendment presuppose the doctrine’s application to government employees, because the doctrine did not become the general American rule until after 1868. *See, e.g.,* Andrew P. Moriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679, 699 (1994) (explaining that only three states adopted the doctrine before 1870 and none before 1808). The supposed “historical understanding of the nature of government employment,” *Engquist*, 553 U.S. at 606, is an innovation post-dating the constitutional provision at issue.

B. Engquist Creates a Novel Definition of Irrationality

This conclusion poses an immediate puzzle: *Engquist* apparently sanctions arbitrary or irrational personnel decisions as consistent with equal protection, while footnote 27 identifies the prohibition of “irrational laws” as the very substance of norms such as equal protection. If, as Chief Justice Roberts clearly affirms, the individual right to equal protection is offended by arbitrary or irrational treatment—which must mean arbitrary or irrational treatment *of* the individual—how can he also write that the Constitution permits government to make individual personnel decisions that are “seemingly arbitrary or irrational”? The *Engquist* opinion offers a hypothetical to address this puzzle:<sup>190</sup>

Suppose, for example, that a traffic officer is stationed on a busy highway where people often drive above the speed limit, and there is no basis upon which to distinguish them. If the officer gives only one of those people a ticket, it may be good English to say that the officer has created a class of people that did not get speeding tickets, and a “class of one” that did. But assuming that it is in the nature of the particular government activity that not all speeders can be stopped and ticketed, complaining that one has been singled out for no reason does not invoke the fear of improper government classification. Such a complaint, rather, challenges the legitimacy of the underlying action itself—the decision to ticket speeders under such circumstances. Of course, an allegation that speeding tickets are given out on the basis of race or sex would state an equal protection claim, because such discriminatory classifications implicate basic equal protection concerns. But allowing an equal protection claim on the ground that a ticket was given to one person and not others, even if for no discernible or articulable reason, would be incompatible with the discretion inherent in the challenged action. It is no proper

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190. The *Engquist* hypothetical is similar to a hypothetical Judge Posner used in a pre-*Engquist* Seventh Circuit case, *Bell v. Duperrault*:

A police car is lurking on the shoulder of a highway in a 45 m.p.h. zone, a car streaks by at 65 m.p.h., and the police do nothing. Two minutes later a car streaks by at 60 m.p.h. and the police give that driver a ticket. Is it a denial of equal protection if the police cannot come up with a rational explanation for why they ticketed the slower speeder?

367 F.3d 703, 712 (2004) (Posner, J., concurring). Posner, like Justice Breyer in *Olech*, would limit class-of-one equal-protection claims to those in which the plaintiff alleges that the official action was “invidiously motivated,” which he later explained to mean an intentional act of “vicious or exploitative discrimination.” *Id.*

challenge to what in its nature is a subjective, individualized decision that it was subjective and individualized.<sup>191</sup>

On its face, this hypothetical might seem to create more problems than it solves.<sup>192</sup> What is the constitutional difference between being singled out for no reason and being singled out on the basis of race or sex? Why does the officer's decision which driver to ticket allegedly on the basis of the driver's race or sex probably violate equal protection, while his decision to do so allegedly out of personal animus (recognizing an old personal enemy, the officer decided to get even a little) raises no equal protection concerns at all?<sup>193</sup> The Chief Justice's frequent descriptions of the decisions in *Engquist*'s case and his traffic-officer hypothetical as "individualized,"<sup>194</sup> paired with his references to the Court's "traditional view of the core concern of the Equal Protection Clause as a shield against arbitrary *classifications*,"<sup>195</sup> suggest one answer. Together, one might read these passages to imply that there is something especially problematic from an equal protection perspective about governmental thinking that uses conceptual groupings of people to make decisions. The only problem with this answer is that it cannot be what the *Engquist* opinion means if the opinion is to make good sense.

There is no escape, in a governmental system based on the rule of law, from the use of classifications, and a great many possible classifications make perfectly good sense, even though they are applied

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191. *Engquist*, 553 U.S. at 603–04.

192. In dissent, Justice Stevens countered that under the circumstances hypothesized, the traffic officer's decision to ticket a single driver would be perfectly rational: "His inability to arrest every driver in sight provides an adequate justification for making a random choice from a group of equally guilty and equally accessible violators. . . . [A] random choice among rational alternatives does not violate the Equal Protection Clause." *Id.* at 613. That seems correct, but I do not think it identifies the most fundamental problem with the Chief Justice's argument.

193. Proving a race- or sex-based invidious intention, in an isolated instance, might be just as difficult as proving personal animus (or even harder), and race and sex are no more, and no less, related to any reason for choosing which driver to pull over than a private history of enmity. Race, of course, is of special equal protection concern because of constitutional history, and one might think the same of sex, at least by analogy. But if that were the answer, the Chief Justice would have had no explanation why class-of-one claims are cognizable in cases such as *Olech* (where there is no historical or originalist argument for special solicitude), but not in *Engquist*. More generally, it would be quite possible to build an understanding of equal protection law as built on the originalist proposition that the paradigm case underlying the Fourteenth Amendment clause concerned discrimination against African Americans as a grouping of people. Equal protection would then apply to other discriminations by analogy and to the extent that the non-originalist situation is analogous. *Engquist* makes no use of any such argument. Nor does footnote 27. On the concept of the paradigm case, see JED RUBENFELD, *REVOLUTION BY JUDICIARY* 15–18, 120–24 (2005).

194. See *Engquist*, 553 U.S. at 602–05.

195. *Id.* at 598 (emphasis added).

to particular persons in particular situations. Neither the presence of a class larger than one in official decisionmaking, nor the fact that the decision bears on an individual, can in itself make any constitutional difference. A decision to fire a particular employee, or ticket a particular driver, because of her race or sex—either of which, Chief Justice Roberts affirms, would raise very serious equal protection concerns—is just as “individualized” as a decision to fire or ticket her for no reason or because of personal dislike. Of course, the use of a broad classification (e.g., African American or female) to make decisions about an individual may indicate or even prove that the decision in question fails to provide any good reason for treating the individual differently than others. However, the invidious use of race or sex does not make the decision any more *irrational* than reaching the same result for no reason or because the decisionmaker is acting out of personal ill will. If, as *Engquist* implies, the overarching concern of equal protection is irrationality—a governmental failure to act in a fashion that logically advances “[some independent] consideration[] in the public interest”<sup>196</sup>—race and sex as irrational motivations for governmental action are no different in kind from simple official ill will, even though they may be more frequent and the offenders more heinous.

The difference between class-based decisions and other individualized decisions does not provide a conceptual justification for the distinction *Engquist* attempts to draw. Furthermore, the effort seems to fly in the face of existing constitutional understandings. It is settled law that the equal protection right belongs to individuals, not to groups.<sup>197</sup> It is equally settled that a classification that serves no purpose—“a classification of persons undertaken for its own sake”<sup>198</sup> as the Court has put it—or the illegitimate purpose of harming people has no rational basis.<sup>199</sup> *Olech*, unquestioned in *Engquist*, established the law that it does not matter constitutionally how many people are affected negatively by a discriminatory decision.<sup>200</sup> Assuming that the decision in *Engquist* does not upset one or more of these propositions, which the majority opinion denies it has done, the category of “improper government classifications” still encompasses those that have no

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196. U.S. Dep’t of Agric. v. Moreno, 413 U.S. 528, 534–35 (1973) (first alteration in original) (quoting Moreno v. U.S. Dep’t of Agric., 345 F. Supp. 310, 314 n.11 (D.D.C. 1972)).

197. See, e.g., Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995) (explaining that the Fourteenth Amendment “protect[s] *persons*, not *groups*” (emphasis in original)).

198. Romer v. Evans, 517 U.S. 620, 635 (1996).

199. *Id.* at 634–35.

200. Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 n.\* (2000).

purpose, those that have a well-known and established bad purpose (unjustified decisions based on race or sex), and those that have a bad purpose peculiar to the particular situation. The assertion that there is no equal protection issue in *Engquist* or in the traffic-officer hypothetical cannot rest on there being something unique about the substance of the governmental decision under either set of facts. There must be some other characteristic common to them that differentiates them constitutionally from *Olech* and from a claim of intentional race or sex discrimination. That differentiating characteristic evidently lies in another aspect of governmental decisionmaking as the majority understands it, although the opinion of the Court is not wholly explicit.

Chief Justice Roberts repeatedly characterizes decisions such as those of *Engquist*'s superiors and of his hypothetical traffic officer as "subjective" and "discretionary."<sup>201</sup> "There are," he remarks, "some forms of state action . . . which by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments."<sup>202</sup> Where a decision "rest[s] on a wide array of factors that are difficult to articulate and quantify,"<sup>203</sup> Roberts adds that "treating like individuals differently is an accepted consequence of the discretion granted. In such situations, allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise."<sup>204</sup> Discretionary decisions of this kind differ entirely from governmental decisions that officials make in the presence of "a clear standard against which departures, even for a single plaintiff, could be readily assessed."<sup>205</sup>

Where the plaintiff claims that "the arbitrary singling out of a particular person"<sup>206</sup> was based on race or sex, the reason that a constitutional challenge lies is because there is a clear standard applicable in that situation: except in extraordinary circumstances, government is not to discriminate on the basis of race or sex. Public action, in short, can be discretionary, or it can be governed by rules. If it is the latter, equal protection requires, at the least, a rational basis for treating one person different than others, but if the action is

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201. See *Engquist*, 553 U.S. at 602–05. The Chief Justice also frequently describes them as "individualized," but that seems to be a misstep in light of the individual nature of the equal protection right.

202. *Id.* at 603.

203. *Id.* at 604.

204. *Id.* at 603.

205. *Id.* at 602.

206. *Id.* at 603.

discretionary, it is a matter of constitutional insignificance that the individual was singled out in a “seemingly arbitrary or irrational manner”<sup>207</sup> or “for no discernible or articulable reason.”<sup>208</sup> There is a domain of rule-governed official behavior and a domain where, as far as the Constitution is concerned, officials may do as they will.

We can now see why Chief Justice Roberts concluded that Engquist had not stated an equal protection claim, in contrast to the plaintiff in *Olech*. Engquist’s class-of-one claim assailed a public decision within the realm of discretion and politics, and that realm lies by definition outside the orderly legal domain governed by equal protection. As noted earlier, in any given case it might be as difficult to prove that a public employee was fired or a driver ticketed on the basis of race or sex as it would be to prove the discriminatory treatment had no basis or was motivated by individual animus. Ferreting out bad motives is a tricky business, and we can grant, for the sake of argument, the Chief Justice’s claim that a well-motivated official might find it difficult to articulate just why he fired or ticketed X rather than Y.<sup>209</sup>

But such difficulties do not exist when the question is whether the official acted intentionally on the basis of race or sex, or because he personally disliked his victim, or for no reason at all—and regardless of which of these it is.<sup>210</sup> Such reasons are not among Chief Justice Roberts’s “vast array of subjective, individualized assessments” that we ordinarily think officials are “entrusted” to make and act upon.<sup>211</sup> The official will know the truth of the matter whether any of them explain his action. He will know, to put it another way, if he acted in constitutional bad faith, on the basis of considerations that the Court has defined as illegitimate, which is true not just of race and sex but of malice and meaninglessness as well. It follows that if the constitutional norm that “people should be ‘treated alike, under like circumstances and conditions’ is not violated”<sup>212</sup> when an official exercises his discretion regardless of whether he does so for a “good reason, bad reason, or no

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207. *Id.* at 605.

208. *Id.* at 604.

209. The *Engquist* opinion seems to make more of the difficulty of explaining personnel decisions than is entirely plausible, particularly given the enormous amount of time and energy American public and private institutions expend attempting to regularize and explain such decisions.

210. The question of officials’ unconscious motivations, while extremely interesting, is not generally relevant under existing constitutional law.

211. *See id.* at 603.

212. *Id.* (quoting *Hayes v. Missouri*, 120 U.S. 68, 71–72 (1887)).



reason at all,”<sup>213</sup> the only explanation can be that the norm is, from the official’s perspective, entirely external to his own thinking, not a basis on which he has a duty to guide his exercise of discretion. His liability to judicial correction if he acts on the basis of race or sex only confirms this: in those circumstances there is an external rule, externally enforced, that sets an outer bound to his domain of discretion. Within that domain, equal protection is silent. The Constitution’s apparent purpose of securing equal protection to all persons is as irrelevant to official discretion in such circumstances as the Internal Revenue Code’s purpose of securing revenue is to taxpayers who do not engage in tax evasion. Taxpayers have no duty of good faith to maximize the government’s goals, and political officials, after *Engquist*, apparently have no duty of good faith to make discretionary decisions conform to the Constitution’s goals.

We have seen this line of reasoning before: *Engquist*’s account of discretion is isomorphic with footnote 27’s understanding of politics. It is easy to understand why Justice Scalia would join the opinion in *Engquist* and, even more to the point for present purposes, why he would cite it in *Heller*.<sup>214</sup> The distinction Chief Justice Roberts draws there between official conduct that is subject to rules and public actions that are entirely a matter of the official’s will is central to Justice Scalia’s own jurisprudential thought.<sup>215</sup> To be sure, the footnote’s “[s]ee, e.g.,” citation to *Engquist*, given in support of a statement about how “we have used” rational-basis scrutiny, glosses over the novelty of *Engquist*’s reasoning, and the extent to which Justice Scalia’s views are a

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213. *Engquist*, 553 U.S. at 606 (quoting Reply Brief for Petitioner at 27, *Engquist v. Or. Dep’t of Agric.*, 553 U.S. 591 (2008) (No. 07-474)).

214. Footnote 27 provides a pinpoint citation to the section of the *Engquist* opinion that includes the traffic-officer hypothetical. *Dist. of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008) (citing *Engquist*, 553 U.S. at 603–04). There can be no real doubt that Justice Scalia intends the footnote to endorse the concept of constitutional irrationality that *Engquist* presents.

215. Justice Scalia has sometimes expressed his jurisprudential preference for hard-edged rules as itself a strategic one, intended to restrain what he views as judicial overreaching and thus much like the New Deal Court’s reason for adopting rational basis. See *Maryland v. Shatzler*, 559 U.S. \_\_\_, 130 S. Ct. 1213, 1223–24 (2010) (majority opinion of Scalia, J.) (explaining the prophylactic and administrative reasons for adopting a per se fourteen day rule governing when the potentially coercive effects of custody should be deemed abated); Scalia, *supra* note 153, at 1179–80 (“[W]hen, in writing for the majority of the Court, I adopt a general rule, and say, ‘This is the basis of our decision,’ I not only constrain lower courts, I constrain myself as well. If the next case should have such different facts that my political or policy preferences regarding the outcome are quite the opposite, I will be unable to indulge those preferences; I have committed myself to the governing principle. . . . Only by announcing rules do we hedge ourselves in.”). If so, there is a serious internal tension in his thinking on the whole subject, because footnote 27 and other entries in the Scalia oeuvre seem to reject a strategic approach categorically.

controversial and contestable position in contemporary legal debate rather than common wisdom.<sup>216</sup> That is, of course, a common rhetorical strategy in doctrinally novel opinions, and not in constitutional law alone, but it should not mislead us into missing the radical nature of what Justice Scalia and Chief Justice Roberts are proposing.

C. *The Understanding of Rationality in Engquist and Footnote 27 Differs Radically from Its Traditional Meaning in Constitutional Law*

The *Engquist* opinion makes internal sense, but the Chief Justice has purchased coherence at the cost of moving dramatically away from traditional constitutional thought. The distinction between rule-governed and discretionary decisionmaking by the political branches is of course at least as old as *Marbury v. Madison*, but its historical role has been to demarcate those decisions where the courts may properly review the lawfulness of political action from those in which the law provides no *justiciable* standard of review.<sup>217</sup> The point of talking about official discretion has not been that the officials should feel free to act whimsically, maliciously, or without regard to constitutional norms.<sup>218</sup>

There is no reason to assume that all exercises of discretion, or even all those that involve the consideration of factors that are subjective or difficult to articulate, stand in the same relationship to constitutional norms: it is difficult to believe that a President making a cabinet nomination has the same duties under equal protection with respect to race and sex that Chief Justice Roberts's traffic officer does in deciding whom to ticket. Official discretion, furthermore, has traditionally been understood to heighten, if anything, the official's duty to act in good faith. As we have seen, however, *Engquist* must logically reject the possibility that there is any duty of good faith that can establish a legal norm relevant to personnel decisions or traffic citations. If there were, the distinction Chief Justice Roberts draws between the equal protection claim at issue in *Engquist* and the one in *Olech* (or a race or sex discrimination claim) would collapse.<sup>219</sup>

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216. *Heller*, 554 U.S. at 628.

217. See Walter Dellinger & H. Jefferson Powell, *Marshall's Questions*, 2 GREEN BAG 2d 367, 373 (1999).

218. Cf. *Engquist*, 553 U.S. at 612 (Stevens, J., dissenting) ("[T]here is a clear distinction between an exercise of discretion and an arbitrary decision.").

219. As I argued earlier, there is no reason that the subjective and hard-to-articulate factors potentially involved in personnel decisions would make it any more difficult for officials to make personnel decisions consistently with a constitutional duty of good faith than it is for them to abide

What is at stake here is the very meaning of rationality—and its opposite—in constitutional law. Although the Constitution's text does not demand, in so many words, that government act rationally, the dominant assumption has long been that irrational official decisions are inconsistent with the constitutional norms of due process and equal protection. Furthermore, both before and after the 1937 shift in constitutional doctrine, it was clear that the rationality necessary to affirm the validity of a law or other public action turns on the presence in official decisions of “[independent] considerations in the public interest,”<sup>220</sup> independent of sheer caprice or the desire to use public authority to pursue private or malicious ends.<sup>221</sup> Before *Engquist* and *Heller*, therefore, constitutional irrationality was a concept encompassing more than the occasional case of a complete breakdown in official reasoning.<sup>222</sup> The judicial rational-basis test, as the Court has consistently described it, reflects this underlying view of what the Constitution demands: the test requires not simply a logical connection between governmental action and governmental purpose, but the presence, at least as a matter of hypothesis, of a constitutionally permissible “legitimate” purpose. A law or other governmental action, on this view, is irrational for constitutional purposes not only when it is senseless, but also equally when it fails to meet a legal requirement of legitimacy in purpose.

This requirement of legitimate purpose is logically independent of the extraordinarily deferential method by which cases such as *Williamson* enforce it. A court following *Williamson* would likely entertain any plausible legitimate purpose that will sustain the validity of the official action, ordinarily without regard to whether the purpose was in fact the ground for the decision. Unless the exercise is entirely a charade, however, even a hypothetical inquiry into purpose presupposes the

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by the rules regarding race or sex—or any more difficult for courts to measure deviations from the duty.

220. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534–35 (1973) (alteration in original) (quoting *Moreno v. U.S. Dep't of Agric.*, 345 F. Supp. 310, 314 n.11 (D.D.C. 1972)).

221. See, e.g., *Bell v. Duperrault*, 367 F.3d 703, 711 (7th Cir. 2004) (Posner, J., concurring) (“[U]nequal treatment due solely to animus is a subset of irrational and arbitrary conduct.”).

222. See *Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n*, 488 U.S. 336, 344 (1989) (applying rule that equal protection requires that “the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy” (quoting *Brown-Forman Co. v. Kentucky*, 217 U.S. 563, 573 (1919))); *Nordlinger v. Hahn*, 505 U.S. 1, 16 (1992) (explaining that “*Allegheny Pittsburgh* was the rare case where the facts precluded any plausible inference that the reason for the unequal [governmental] practice was to achieve the benefits of” a rational governmental policy).

normative requirement that government act for some legitimate reason.<sup>223</sup> The admittedly rare cases in which a public action is held invalid because it actually was senseless or solely motivated by an impermissible purpose show as much.<sup>224</sup> The Court's employment of rational-basis scrutiny, before footnote 27 and *Engquist*, was confirmation that the Constitution demands of public decisions not merely logic but, equally, respect for an understanding (no doubt largely implicit) about what is legitimate and illegitimate to do in the exercise of official power. The baseline of the American constitutional order is a government that acts rationally, but not merely in the sense that it has reasons for what it does; rationality in traditional thought has also meant that government's actions are undertaken in good faith and for reasons that are generally seen to be appropriate.<sup>225</sup>

Footnote 27 and *Engquist* rest on a very different understanding of constitutional rationality. *Engquist* flatly denies that legitimacy in purpose or even any purpose at all is constitutionally required when the official action involves a discretionary decision of the sort *Engquist* classed as "subjective." By citing *Engquist* to exemplify what the Constitution means by "irrational laws," footnote 27 implies that *Engquist's* reasoning is generalizable beyond the specifics of government employment. More particularly, in light of *Engquist's* unavoidable rejection of a general duty to act in good faith for legitimate (or at least not for illegitimate) purposes, footnote 27's invocation of *Engquist* suggests that there is no normative element to rationality. Generally, rationality and legitimacy have no necessary or essential

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223. As we have seen, the Court has traditionally viewed *Williamson's* indulgence in hypothesizing a form of deference to a legislature or other decisionmaker, see *Williamson v. Lee Optical*, 348 U.S. 483, 487–88 (1955); Part IV.C, that itself is supposed to have determined, non-hypothetically, that there are "[independent considerations] in the public interest" that support the decision. *Moreno*, 413 U.S. at 534–35 (alteration in original) (quoting *Moreno*, 345 F. Supp. at 314 n.11).

224. The Court described one of those cases as "[a]pplying the basic principles of rationality review" to invalidate a city ordinance because "the city's purported justifications for the ordinance made no sense in light of how the city treated other groups similarly situated in relevant respects." *Bd. of Trs. v. Garrett*, 531 U.S. 356, 366 n.4 (2001) (discussing *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 447–450 (1985)).

225. Cf. *Duperrault*, 367 F.3d at 710 (Posner, J., concurring). Judge Posner explained that equal protection is violated if an official engages in discrimination for "reasons of a personal nature unrelated to the duties of the defendant's position," *id.* (quoting *Hilton v. City of Wheeling*, 209 F.3d 1005, 1008 (7th Cir. 2000)), and that these reasons "go beyond personal hostility to the plaintiff (i.e., animus) . . . [and] larceny, . . . or a desire to find a scapegoat in order to avoid adverse publicity and the threat of a lawsuit . . . —improper motives for a public official (scapegoating is not a legitimate tactic of public officials any more than stealing is), but different from personal hostility." *Id.* (citations omitted).

relationship in constitutional law. The irrational, as far as the Constitution is concerned, is that which makes no sense at all, and the Constitution permits governmental authority to be structured, at least much of the time, so as to license official actions undertaken for no reason or bad ones. There are, to be sure, constitutional rules forbidding certain specific governmental purposes but no general norm that government must have good reasons for acting.

In one sense, Justice Scalia in footnote 27 and the *Engquist* Court agree with the great legal realist Felix Cohen, who wrote long ago that the rational-basis test “makes of our courts lunacy commissions sitting in judgment upon the mental capacity of legislators and, occasionally, of judicial brethren,”<sup>226</sup> but Justice Scalia and Chief Justice Roberts do not think this is a mistake due to the dominance of an arid legal conceptualism—“transcendental nonsense”—as Cohen saw it. The courts are lunacy commissions in rational-basis cases, Justice Scalia and Chief Justice Roberts imply, because lunacy is all that the underlying constitutional command prohibits. Even that prohibition, trivial as it surely is, has no application when the government is exercising what the *Engquist* Court calls “discretion,” for decisions that can be made for any reason or none cannot rightly be said to be crazy (or rational, for that matter); the very concept of rationality has no application.<sup>227</sup> Perhaps there are other, non-constitutional modes of evaluation that can be applied in such circumstances, but the constitutional baseline makes no necessary demands that government follow either logic or legitimacy except insofar as it is subject to the external compulsion of judicial review. The irrational is, as a constitutional matter, perfectly thinkable.

## VII. FOOTNOTE 27 REWORKS THE DISTINCTION BETWEEN LAW AND POLITICS ON THE ROBERTS COURT

U.S. Supreme Court Justices and scholars interested in the Court talk endlessly about the relationship between constitutional law and politics. The Justices accuse one another of making political rather than properly legal decisions; some of the scholars attempt to prove that in fact all the

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226. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 819 (1935).

227. Recall that the conclusion in *Engquist*—never put so bluntly—was that Engquist’s superiors had not violated the Constitution regardless of what senseless or malicious factors led to her selection for discharge. See 553 U.S. at 595–96 (discussing Engquist’s claim, accepted by the jury, was that she was discharged for “arbitrary, vindictive or malicious reasons” (internal quotation marks omitted)); *id.* at 606 (explaining that the Constitution does not prohibit government from “treat[ing] an employee differently from others for a bad reason, or for no reason at all”).

Justices play politics while others provide theories about how the Court can avoid politics and stick to law. Footnote 27, like any other serious assertion about constitutional law, has a location amid these debates.<sup>228</sup>

Justice Scalia, as both a scholar and a judge, subscribes unequivocally to the proposition that the Court ought to steer clear of politics<sup>229</sup>—but then no Justice ever says the reverse. More interestingly, he believes that law and politics can be distinguished quite clearly, and that it is only willfulness or (self-)obfuscation that leads anyone to pretend otherwise.<sup>230</sup> The Justices, he argues, can and ought to be “doing essentially lawyers’ work up here—reading text and discerning our society’s traditional understanding of that text,” and lawyers’ work, as he sees it, is an intellectual process of dealing with rules external to the lawyer’s own reason and judgment: “Texts and traditions are facts to study.”<sup>231</sup> Law is a matter of the reasoned explication and implementation of values, to be sure,<sup>232</sup> but they are values that others than the lawyer-as-judge dictate. Normative judgments about what values govern in the public sphere can only be the product of choice and will, not of reasoning in common, and as such they lie by definition beyond the competence of the lawyer-as-judge in a democracy.<sup>233</sup> “Value judgments, after all, should be voted on, not dictated”<sup>234</sup> and

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228. One can locate the footnote, and Justice Scalia’s views as a whole, in other debates as well. Jurisprudentially, for example, Scalia’s textualist approach to constitutional and statutory interpretation is usually seen as a form of legal positivism and/or formalism. *See, e.g.*, Brian Leiter, *Positivism, Formalism, Realism*, 99 COLUM. L. REV. 1138, 1150 (1999) (distinguishing Justice Scalia’s formalism from legal positivism); George Kannar, Comment, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1307 (1990) (classing Justice Scalia as both a positivist and a formalist).

229. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 603–04 (2003) (Scalia, J., dissenting) (distinguishing actions that are “within the range of traditional democratic action” as “judgments are to be made by the people” rather than the Court); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863 (1989) (endorsing originalism in constitutional law because it alleviates the problem a judge will have distinguishing “those political values that he personally thinks most important, and those political values that are ‘fundamental to our society’”); Antonin Scalia, *A Tribute to Chief Judge Richard Arnold*, 58 ARK. L. REV. 541, 542 (2005) (praising Judge Arnold for Arnold’s rejection of the view that “judges are just politicians in another guise”).

230. *See* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 981 (1991) (Scalia, J., concurring in part and dissenting in part) (“[T]he Court does not wish to be fettered by any such limitations on its preferences.”); *id.* at 1000–01.

231. *Id.* at 1000.

232. *See* *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality opinion of Scalia, J.) (“[L]aw pronounced by the courts must be principled, rational, and based upon reasoned distinctions.”).

233. Justice Scalia’s trademark opposition to the judicial use of legislative history, a matter on which I believe that he is largely correct, is also rooted in part in his conviction that value judgments are not, in the end, amenable to reasoned debate.

234. *Casey*, 503 U.S. at 1001.

therefore it is in politics that the function of “making value judgments” must rest.<sup>235</sup> That is true if one understands democracy to entail the principle that anything requiring a normative judgment “should be voted on”<sup>236</sup> because such decisions can never be determined by “reasoned judgment,” but must always be choices that express “only personal predilection.”<sup>237</sup> Footnote 27 embodies that understanding: the idea that men and women can reason in secular society about the normative is for Justice Scalia a pernicious fantasy.

In the world of footnote 27, constitutional law ratifies this subordination of legal reason to political will. Constitutional review by the courts is limited to the enforcement of specific constitutional value judgments, which are themselves the product of political choice by the people (the highest political decisionmaker). Beyond the scope of whatever clear rules the people have chosen to mandate, public decisions are simply public choices, and the Court should not pretend otherwise, or suggest the existence of constitutional obligations that cannot be reduced to such rules.<sup>238</sup> For Justice Scalia, the idea that the Constitution requires public decisions to be rational (or reasonable) in the traditional sense, involving as it does judgments about the legitimate ends of public action, makes no sense. Footnote 27 accordingly rejects the traditional understanding of rational-basis scrutiny, but its full implications go much further. Rationality as a normative requirement has been a feature of American constitutional law from the beginning, in large measure because the early Republic created constitutional law in the image, and using the tools, of the common law. The Court’s self-conscious creation and application of doctrine reflects constitutional law’s inheritance of the common law’s robust confidence in the meaningfulness of reasoned legal debate over normative issues. Because Justice Scalia believes that confidence is misplaced, he unsurprisingly rejects, at least in principle, much of the common law structure of constitutional law as a whole.

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235. *Id.* at 1000.

236. *Id.* at 1001.

237. *Id.* at 984. Cf. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863 (1989) (“[T]he main danger in judicial interpretation of the Constitution—or, for that matter, in judicial interpretation of any law—is that the judges will mistake their own predilections for the law.”).

238. See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (Scalia, J., plurality opinion) (“[J]udicial action must be governed by *standard*, by *rule*” whereas “[l]aws promulgated by the Legislative Branch can be inconsistent, illogical, and ad hoc . . .” (emphasis in original)); *Michael H. v. Gerald D.*, 491 U.S. 110, 128 n.6 (1989) (opinion of Scalia, J., announcing the judgment of the Court) (“[A] rule of law that binds neither by text nor by any particular, identifiable tradition is no rule of law at all.”).

Justice Scalia is, of course, only one person on the nine-member Court. But there are good reasons to think that in footnote 27 he has given us an important clue to the future direction of the Roberts Court as an institution. Justice Scalia's energy and his strong convictions about constitutional theory have long made him one of the intellectual driving forces on the Court: a recent biography observed that "Scalia might be at the apex of his influence[, w]ith conservatives holding the balance of power, and still being among the younger members of the nine . . . ."<sup>239</sup> Footnote 27 cited, and on examination is of a piece with, Chief Justice Roberts's opinion in the little-remarked *Engquist* decision, suggesting a deep congruity between Justice Scalia's views and Chief Justice Roberts'. Roberts is a notoriously skillful Chief Justice,<sup>240</sup> and Justice Holmes pointed out long ago that it is "little decisions which the common run of selectors would pass by" that often "have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."<sup>241</sup> Justice Scalia's footnote and Chief Justice Roberts's opinion contain between them just such a wider theory, and that theory seems reflected once again in the exchange between Justices Alito and Breyer in *McDonald*, where Alito denied and Breyer embraced a broader normative role for judges in constitutional decisions.<sup>242</sup> Nor was *McDonald* the only indication from the Court's October Term 2009 that the footnote 27 understanding of constitutional irrationality commands the allegiance of at least a plurality of the Justices.<sup>243</sup> Should a majority of Justices adopt this view, that would indeed work a profound change in the tissue of constitutional law.

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239. JOAN BISKUPIC, *AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA* 364 (2009).

240. See Adam Liptak, *The Most Conservative Court in Decades*, N.Y. TIMES, July 25, 2010, at 18 ("Chief Justice Roberts is certainly widely viewed as a canny tactician.").

241. Oliver Wendell Holmes, John Marshall (Feb. 4, 1901), in 3 THE COLLECTED WORKS OF JUSTICE HOLMES 500, 501 (Sheldon M. Novick ed., 1995).

242. See *supra* Part I.

243. See the debate between Justices Scalia and Kennedy in *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. \_\_\_, 130 S. Ct. 2592, 2604–08, 2613–18 (2010). Justice Kennedy argued that the Court should not reach the question whether a judicial decision can effect a taking of property within the meaning of the takings clause, in part because substantive due process principles already render invalid judicial decisions that are "arbitrary or irrational." *Id.* at 2615 (Kennedy, J., concurring) (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005)). Justice Kennedy took this concept to include considerations of the "legitimacy" of . . . the court's judgment" and its effect on the reasonable expectations of the property-holder. *Id.* at 2614 (quoting *E. Enter. v. Apfel*, 524 U.S. 498, 545 (1998)). Justice Scalia responded that this understanding of substantive due process is "such a wonderfully malleable concept" that "even a firm commitment to apply it would be a firm commitment to nothing in particular." *Id.* at 2608.



## CONCLUSION

Footnote 27 in *District of Columbia v. Heller* opens a window onto a brave new world of constitutional realism in which it is irrationality rather than reason that lies at the heart of our constitutional order. In that world there are constitutional rules, and where they apply, judges can enforce them even as to political actors. And there is the exercise of discretionary political power, with which judges cannot meddle in the Constitution's name even if the power is exercised in ways that contravene the Constitution's norms. Mystifications—transcendental nonsense—such as reasoned judgment and good faith are to be swept aside. The footnote's world is brilliantly lit, with razor-sharp edges between light and darkness, sense and nonsense. It is also a cold world, and (for this author at any rate) a little frightening.